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No.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,

Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

A. By enacting Section 1403 of the Federal Aviation Act, 49 U.S.C. Section 1403 (1981), requiring the recordation of conveyances affecting aircraft, did Congress preempt state law insofar as state law would permit the conveyance of title to aircraft by transfer of possession alone, without FAA recording?

B. May a federal claim for civil damages be maintained under Section 1403 of the Federal Aviation Act, 49 U.S.C. Section 1403 (1981), by an aircraft purchaser or financer against a prior unrecorded purchaser of the same aircraft, where the first purchaser has ignored the FAA recording requirements and the subsequent purchaser or financer relies to his detriment on the status of title shown in the FAA registry and buys or extends credit on the strength of such title?

C. Should Plaintiff Shacket be estopped from asserting title to the aircraft at issue because he failed to record his purported conveyance with the FAA?

Philko Aviation, Inc., the Petitioner herein, is a wholly owned subsidiary of McArdle, Ltd., a Delaware Corporation. Philko Aviation, Inc. has no subsidiaries. McArdle, Ltd. has the following wholly owned subsidiaries in addition to Philko Aviation, Inc.: Airport Farms, Inc.; American Lodging Corp.; Big Flamingo II, Inc.; Bonhomme Richard, Ltd.; Burr Hill Country Club Inc.; Burr Hill Properties, Ltd.; Forty-Six East Oak, Ltd.; Pheasant Run, Inc.; Rockton Productions, Inc.; Smith Road Properties, Ltd.; Spanish Lakes, Inc. and Wilson World Travel, Inc.

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In The

Supreme Court of the United States

October Term, 1982

PHILKO AVIATION, INC.,

Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

The petitioner Philko Aviation, Inc. respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 22, 1982.

OPINIONS BELOW

The opinion of the Court of Appeals, not yet reported, appears in the Appendix A hereto. The opinion of the District Court for the Northern District of Illinois is published at 497 F. Supp. 1262 (N.D. Ill. 1980). A copy of the district court's declaratory judgment order and two memorandum opinions are attached as Appendix B, C and D.

JURISDICTION

The judgment of the Court of Appeals for the Seventh Circuit was entered on June 22, 1982 and this petition for certiorari was filed within sixty days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article VI of the United States Constitution

49 U.S.C. Sec. 1403 (1964)

49 U.S.C. Sec. 1406 (1964)

Uniform Commercial Code Section 2-403, Ill. Rev. Stat. Ch. 26 Sec. 2-403 (1980).

The full text of these constitutional and statutory provisions are included in Appendix F.

STATEMENT OF THE CASE

On April 19, 1978 pursuant to a contract of sale, Maurice and Sylvia Shacket attempted to purchase a 1978 Piper Navajo, Serial Number 78MS, from Roger Smith Aircraft Sales Inc. (Smith Inc.) in Aurora, Illinois. The purchase price was to be $126,000 plus the trade-in of

Mr. Shacket's existing aircraft. Shacket met Roger Smith, President of Smith Inc., in Aurora on April 19, 1978 and paid Smith Inc. $106,000. Prior to this date, Shacket had paid $20,000 and had delivered his trade-in aircraft to Smith, Inc. Although Maurice Shacket, an experienced pilot, was familiar with FAA recording requirements and had himself prepared a bill of sale and a registration form at a previous aircraft purchase, he did not obtain the original bills of sale for the 78MS aircraft from Smith Inc. Moreover, Shacket retained the bills of sale on his trade-in aircraft pending receipt of the original bills of sale from Smith Inc. On April 19, 1978 Shacket took possession of the aircraft and flew it to the State of Michigan where he resides.

On April 21, 1978 Smith Inc. offered to sell the same Piper Navajo 78MS to Philko Aviation Inc. (Philko). Smith Inc. demonstrated a clear chain of title by presenting to Philko the original bills of sale from the manufacturer, Piper, through two intervening dealers, North States Aviation and Clark Aviation, to Smith Inc. (See Appendix E).

Smith Inc. offered to sell the aircraft to Philko for $212,000. At that time Smith Inc. was obligated to Philko for $60,000. This debt had arisen out of a loan by Philko to Smith Inc. The purchase price of $212,000 was to be paid by Philko in the form of $152,000 in cash and the cancellation of the $60,000 debt. Roger Smith persuaded Philko to enter into this transaction by falsely representing *inter alia* that Smith Inc. had a ready buyer for the plane, named Krueger Aviation, to whom Philko could sell the plane if it so desired. Philko obtained a loan of $152,000 from the Sandwich State Bank in Sandwich, Illinois. Philko, through an agent of the Sandwich State Bank, verified the status of the title with the FAA in Oklahoma City. The FAA register showed that Piper Aircraft Corporation had manufactured

this new aircraft and that record notification had been submitted by Piper showing a proposed transfer to North States Aviation, an authorized Piper distributor. (Deposition of Richard Andrews, Vice President of Sandwich State Bank, pp. 81-86.) Philko paid $152,000 to Smith Inc. and cancelled the existing debt. Philko then recorded the original bills of sale and the Sandwich State Bank recorded its chattel mortgage on the aircraft for $152,000.

Shacket then filed a two count suit. The first count sought a declaratory judgment pursuant to 29 U.S.C. Sec. 2255 (1981) that title to the aircraft rested in Shacket. The second count alleged fraud against Philko and Smith Inc. Philko filed a counterclaim in two counts, seeking a declaratory judgment of title in Philko and the second seeking damages of $160,000. Philko also raised by way of affirmative defense a claim of estoppel based on Shacket's failure to record.

Although Shacket's complaint alleged federal jurisdiction on the basis of diversity pursuant to 28 U.S.C. Sec. 1332 (1981), neither the district court nor the Court of Appeals below articulated the jurisdictional basis upon which the judgment order was entered. Philko submits that the District Court had original jurisdiction pursuant to 29 U.S.C. Sec. 1331 because this case presents federal questions arising under Section 1403 of the Federal Aviation Act and the Supremacy Clause, Article VI of the United States Constitution.

Both parties filed cross motions for summary judgment. Shacket sought a declaration of title in him and damages for fraud. Philko sought a declaration of title in its favor and damages of $160,000 on its counterclaim. The district court entered a judgment declaring title to the aircraft in Shacket and denying all other relief requested by the parties.

REASONS FOR GRANTING THE WRIT

1.

THE DECISION BELOW CONFLICTS IN PRINCIPLE WITH THE DECISIONS OF OTHER COURTS OF APPEAL, AND CONFLICTS WITH DECISIONS OF THE SUPREME COURT OF THE STATES OF CALIFORNIA AND OKLAHOMA CONCERNING THE PREEMPTIVE EFFECT OF SECTION 1403.

The present controversy is engendered by a conflict between Section 1403(c) of the Federal Aviation Act, 49 U.S.C. Sec. 1403 (1981), and Section 2-403 of the Uniform Commercial Code which has been adopted by virtually every state. Section 1403(c) invalidates unrecorded conveyances of title to aircraft as against third parties without notice. Section 2-403 of the Uniform Commercial Code authorizes the valid conveyance of title to goods, including aircraft, merely by the transfer of possession. Under the Supremacy Clause, the federal recording requirement must be given precedence. Otherwise the legitimate Congressional objective of providing a reliable central register for instruments affecting aircraft title will be frustrated.

The decision of the Court below judicially repeals Section 1403(c). Under its holding Shacket failed to record, Philko relied upon the status of title shown at the FAA register and duly recorded his conveyance, but Shacket nevertheless prevailed. This decision conflicts in principle with the opinions of the Third, Fourth, Fifth, Ninth and Tenth Circuits. Although the Courts of these Circuits have recognized, specifically in light of Section 1406, 49 U.S.C. Sec. 1406 (1981), that 1403 has a limited preemptive effect, they nevertheless agree that in enacting Section 1403 Congress intended a mandatory central filing register. Congress' avowed purpose was to provide

aircraft purchasers and encumbrancers with a single, central location to which they could look for instruments affecting title to aircraft. This Congressional purpose was evident in the original Civil Aeronautics Act of 1938. Section 523 of the Civil Aeronautics Act was reenacted substantially unchanged as Section 1403 of the Federal Aviation Act of 1958. 2 U.S. Code Cong. & Ad. News 3755 (1958). Congress left Section 1403 intact when it enacted Section 1406 in 1964. In enacting Section 1406, Congress federalized the choice of law rules for testing the substantive validity of such instruments, but it did not modify or eliminate the recording requirement.

The Third Circuit in *Sanders v. M. D. Aircraft Sales, Inc.*, 575 F.2d 1086 (3rd Cir. 1978) decided that the Federal Aviation Act did not preempt state law insofar as the substantive validity of a *recorded* security interest in an aircraft was concerned. This case presented a dispute between a floor plan financing company and a buyer in the ordinary course of business and is typical of many of the reported decisions. In ruling in favor of the buyer, the Court looked to underlying state law (Section 9-307 of the Uniform Commercial Code) to test the substantive validity of a recorded security interest. The Court, however, recognized that through Section 1403 Congress had adopted a federal recording system. *Id.* at 1088.

The Fourth Circuit in *Haynes v. General Elec. Credit Corp.*, 582 F.2d 869 (4th Cir. 1978) affirmed *per curiam* a decision of the District Court for the Western District of Virginia in favor of a buyer in the ordinary course over a prior recorded secured lender. Both parties had recorded in conformance with FAA requirements. The District Court in that case had expressly stated that "federal law governs the relative rights of third parties

and other claimants to the aircraft only to the extent that those rights are dependent on the *fact* or time of recordation." *Id.* at 767. (Emphasis added.) The case now before this Court should be determined by federal law because Shacket's rights in the aircraft are initially dependent on his recording. Until Shacket recorded an instrument, as to third parties his purported conveyance was invalid.

The Fifth Circuit in *Bank of Lexington v. Jack Adams Aircraft Sales, Inc.*, 570 F.2d 1220 (5th Cir. 1978) was faced with a dispute between two recorded security interests. The Court expressly recognized that the Federal Aviation Act created a framework for a nationwide system to record certain interests in aircraft. To the extent that state law conflicts with any part of the Act, the Court held that state law was preempted. *Id.* at 1224.

The Ninth Circuit Court of Appeals in *CIM International v. United States*, 641 F.2d 671 (9th Cir. 1980) noted that the purpose of the recording provisions of Section 1403 is to protect persons who have dealt on the faith of the FAA register so as to lend stability in a nationwide market for aircraft, a highly mobile product. *Id.* at 674. The Court further stated that it is wrong "to favor a party who totally ignored the FAA registry to the detriment of the party who apparently respected it." *Id.* at 676. *CIM International, id.*, presented a dispute between the assignee of a recorded aircraft security interest against an unrecorded federal tax lien. Because CIM purchased the secured creditor's interest in the aircraft on the strength of the title as shown in the FAA register, it prevailed over the unrecorded tax liens which arose prior to CIM's purchase.

The Tenth Circuit in *State Securities Co. v. Aviation Enterprise*, 355 F.2d 225 (10th Cir. 1966), ruled in favor

of a buyer in the ordinary course of business as against an unrecorded secured lender who claimed a chattel mortgage on an aircraft. Neither party had recorded with the FAA, but the buyer attempted to record his bill of sale. The Tenth Circuit unequivocally recognized that "[B]y providing a federal system for registration of conveyances and liens affecting title to aircraft, Congress has preempted that field and state recording statutes are not applicable to such title instruments." *Id.* at 229. If a state statute which would mandate recording aircraft title interests in a place other than the FAA register is preempted by Section 1403, it follows that a state statute (namely 2-403) which would entirely dispense with recording the conveyance of title to aircraft is also preempted and should be given no effect.

Two state Supreme Courts have recognized the preemptive effect of Section 1403: *Dowell v. Beech Acceptance Corporation*, 91 Cal. Rptr. 1, 476 P.2d 401 (1971), and *McCormack v. Air Center Inc.*, 571 P.2d 835 (Supreme Court of Oklahoma, 1977). The former held that the federal recording requirement absolutely preempted state law, even to the point that a buyer in the ordinary course does not find protection against a prior secured lender under Section 9-307 of the UCC. The latter held that the federal recording statute supplanted the Oklahoma artisan's lien statute insofar as the state statute mandated recording a lien in a place other than the FAA register.

The decision below is also at odds with the decisions of many lower courts which have held that the party who relies upon the FAA title register should prevail over one who has failed to record. For example, in *Marsden v. Southern Flight Service Inc.*, 227 F. Supp. 411 (M.D. N.C. 1961), a lender who extended credit on the strength of title shown in the FAA register was given

priority over a prior purchaser who failed to record his conveyance. In *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E.2d 610 (1949) the Georgia appellate court held that as between two purchasers of the same aircraft, the second purchaser should prevail where the first purchaser failed to record his conveyance with the FAA. See also *O'Neill v. Barnett Bank of Jacksonville, N.A.*, 360 So. 2d 150 (1978). Petitioner Philko submits that if this case had been filed in California, Oklahoma, Florida or North Carolina, the opposite result would have been obtained. The state courts of other states will undoubtedly be faced with the task of determining the preemptive effect of Section 1403 in the future. A pronouncement by this Court as to the preemptive effect of Section 1403 will give this unsettled area of the law urgently needed uniformity.

It is clear from many decided cases that a purchaser or lien creditor cannot have a valid interest as against any third party without notice unless he records. In a dispute between or among holders of competing *recorded instruments*, substantive state law should determine the outcome as Section 1406 plainly states. The decisions of the District Court and the Court of Appeals below, however, go beyond this plain intent and meaning of Sections 1403 and 1406. By giving Shacket's unrecorded interest priority over that of Philko, they have created an exception to the recording requirement which swallows the rule. Because of the decision below, it is now imprudent, if not impossible, to rely upon the status of title shown at the FAA register. A buyer such as Philko, even if he takes possession, cannot determine whether the aircraft he is purchasing was the subject of a prior purchase. The decision below casts aircraft title and financing law back to the chaotic posture it was in before the Civil Aeronautics Act was enacted. If title to an aircraft can be conveyed without the delivery of any

written instrument, as in Shacket's case, the choice of law rules of Section 1406 are also rendered inoperable. The decision below has clearly misconstrued Section 1403 and Petitioner requests the Court to grant a writ of certiorari to review this decision.

2.

THE ISSUE OF THE EXTENT TO WHICH SECTION 1403 OF THE FEDERAL AVIATION ACT PREEMPTS STATE LAW IS ONE OF MAJOR IMPORTANCE TO THE INCREASING NUMBER OF PERSONS DEALING IN THE PURCHASE, USE AND FINANCING OF AIRCRAFT, ONE OF THE MOST HIGHLY MOBILE OBJECTS IN INTERSTATE COMMERCE.

Both federal and state courts are faced with the task of construing Section 1403 in disputes concerning title to aircraft. Because of the ever increasing volume of aircraft sales and financing, the prevalence of such disputes can be expected to continue and grow. Several commentators have expressed that a decision on the preemption issue by the Supreme Court, the final arbiter of questions of federal law, would go far to remove significant uncertainties and conflicts in connection with priorities among competing interests in aircraft and the relationship of the FAA act to state law.[1] The present controversy squarely poses the preemption question. It presents an opportunity for this Court to reduce litigation in this area by eliminating a piecemeal and inconsistent evolution of principles regarding the preemptive effect of Section 1403 and the relationship of FAA recording to state law.

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[1] *See e.g.*, Sigman, The Wild Blue Yonder: Interests in Aircraft Under Our Federal System, 46 So. Cal. L. Rev. 318 (1973); Eyer, W.W., The Sale Leasing and Financing of Aircraft, 45 Journal of Air Law and Commerce 217 (1979-1980).

3.

AN IMPORTANT AND NOVEL QUESTION OF FEDERAL LAW IS ALSO PRESENTED BY THIS CASE: CAN A FEDERAL CLAIM FOR CIVIL DAMAGES BE MAINTAINED AGAINST A PURCHASER WHO FAILS TO RECORD HIS CONVEYANCE BY A PARTY WHO, IN RELIANCE UPON THE FAA REGISTER, PURCHASES OR EXTENDS CREDIT WITHOUT KNOWLEDGE OF THE UNRECORDED PURCHASE?

If Section 1403 does not preempt state law insofar as state law would permit conveyance of title to aircraft without recording, then the reliability and usefulness of the FAA central registry will vanish unless some sanction is imposed against the non-recording party. Petitioner Philko submits that it should be permitted to maintain a federal claim against Shacket for damages to the extent such damages were proximately caused by Shacket's failure to record his conveyance. The criteria for implication of such a federal claim as expressed in *Cort v. Ash*, 422 U.S. 66 (1975) are clearly met here:

First, Philko, being a third party without notice of Shacket's transaction, who relied on the information at the FAA registry and the original bills of sale, clearly is one of the class for whose especial benefit Section 1403(c) was enacted;

Second, the legislative history of the FAA recording provisions indicates that Congress intended to make mandatory the requirement of recording instruments affecting aircraft title. Senate Commerce Committee Report No. 1060, which accompanied the bill subsequently enacted as 49 U.S.C. Sec. 1406 contains the most recent pronouncement of the legislature on the FAA recording requirements:

> The fact that the determination of the validity of aircraft conveyances involved extremely cumbersome and complex procedures was recognized by

> the Congress when it originally enacted the Civil Aeronautics Act of 1938. That act contained a provision which provided for the establishment of a central national recording system for all instruments affecting title to or interest in civil aircraft of this country. This provision was incorporated in section 503 of the Federal Aviation Act of 1958 substantially without change. It continued the previously established recording system and provides that no conveyance or instrument affecting aircraft shall be valid until filed for recordation except as to parties to the instrument or persons with actual knowledge of its existence. When the instrument has been filed for recordation under the law, all persons are deemed to have notice of its existence and its effect on title to the property covered thereby. Consequently, to determine whether there are any encumbrances on the aircraft, it is only necessary to consult the central file.

If the legislative intent is to create a reliable central register it follows that parties dealing with aircraft titles should not be permitted to disregard the federal statute with impunity. If the failure to record does not vitiate a party's interest (as the Court below held) it follows that the party who is damaged by relying on the FAA register should be entitled to recover from a prior purchaser or encumbrancer who fails to record. An action for civil damages is therefore implicit in the mandatory nature of the FAA recording requirements.

Third, an action for civil damages is fully consistent with the Act. Congress has given persons who deal with aircraft the right to rely upon the status of title at the FAA register. A civil action for damages is necessary to effectuate the Congressional plan of providing a comprehensive central registry for aircraft titles. Such a cause of action will insure compliance with the statute.

Fourth, the claim for damages for failure to record pursuant to Section 1403(c) is not the type of claim which can be relegated to state law because the recording requirement does not arise under state law. A state court could employ the doctrine of estoppel to preclude a non-recording party from asserting title, but if the failure to record does not affect such party's title (as the Court below found) the principle of estoppel does not afford an aggrieved party any affirmative relief. Only a federal claim under Section 1403(c) will give a remedy to a party injured by the failure to record.

The law will not suffer a wrong without a remedy. If Philko has the right to rely on the status of title as shown by the FAA registry, but cannot achieve good title in reliance upon it, then at least Philko should be entitled to a remedy of damages against the party whose nonfeasance caused the loss. It is clearly foreseeable that if the original bills of sale to an aircraft are left in the hands of the seller that the seller may attempt to re-sell or encumber the plane. In such case the party who fails to record, as the federal statute mandates, should rightfully bear the consequences. Otherwise the federal recording statute is itself the instrument through which fraud can be perpetrated. Such a result cannot be condoned.

4.

SHACKET SHOULD BE ESTOPPED FROM CLAIMING TITLE TO THE AIRCRAFT.

Plaintiff Shacket could have prevented the fraud on Philko from occurring if he had demanded the original bills of sale from Smith Inc. at the closing of his purchase. Since Shacket by his own actions created the facts upon which Smith Inc. was able to demonstrate a

clear chain of title, Shacket should be estopped from asserting any claim to the aircraft Philko purchased.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Seventh Circuit.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 81-1249

MAURICE SHACKET and SYLVIA SHACKET,

Plaintiffs-Appellees,

v.

PHILKO AVIATION, INC.,

Defendant-Appellant.

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division.
No. 78 C 4284—**Milton I. Shadur**, *Judge.*

ARGUED JANUARY 4, 1982—DECIDED JUNE 22, 1982

Before PELL, *Circuit Judge*, MARKEY, *Chief Judge*,* and SPRECHER, *Circuit Judge*.**

MARKEY, *Chief Judge*. Appeal from a judgment of the district court for the Northern District of Illinois declaring title to an aircraft by way of summary judgment granted to Maurice and Sylvia Shacket. We affirm.

* Howard T. Markey, Chief Judge of the United States Court of Customs and Patent Appeals, is sitting by designation.

** Judge Robert A. Sprecher was present at oral argument and at the post-argument conference but was unable to review the opinion before his death.

Background

In April 1978, Roger Smith Aircraft Sales, Inc. (Smith Aircraft) sold a new, custom-built Piper Navajo aircraft, registration number N78MS, to Maurice and Sylvia Shacket, who took possession at that time. Subsequently, Smith Aircraft purported to sell the same aircraft to Philko Aviation Company (Philko), the "sale" being financed by Sandwich State Bank (Bank), which purported to take a security interest in the aircraft.

The Shackets brought suit for a judgment declaring their right of ownership in the aircraft. The Shackets and Philko filed motions for summary judgment. Judge Shadur granted summary judgment in favor of the Shackets. Philko's motion for reconsideration was denied, but the court modified its prior opinion respecting certain factual matters and terminology.

Background

Maurice Shacket, a private pilot and aircraft owner for many years, and his wife Sylvia, contracted with Smith Aircraft in 1977 to buy the aircraft for $126,000 plus the trade-in of an aircraft valued at $120,000, giving a check for $20,000 as a down payment. Smith Aircraft, engaged in buying and selling used aircraft, contracted to purchase the new aircraft from Clark Aviation, Inc. (Clark), a Piper franchisee. The Shackets were aware of the arrangements between Smith Aircraft and Clark, and were in contact with Kenneth Rittenhouse, Clark's president and principal shareholder, regarding customizing of the aircraft before final delivery. Citing financial problems Clark had with Smith Aircraft, Rittenhouse requested that he be present at the closing and advised the Shackets not to pay Smith Aircraft unless he was there. The Shackets agreed.

Before the closing, Smith Aircraft located a customer for its resale of the trade-in aircraft. The Shackets relinquished possession of that aircraft for delivery to that customer, keeping the title papers as presumed security for the transaction.

At the closing, Mr. Shacket asked Rittenhouse whether it was all right to close the purchase and Rittenhouse said it was, though Rittenhouse had not yet received full payment from Smith Aircraft. The Shackets then endorsed two cashiers' checks, aggregating $106,000, in favor of Smith Aircraft. Rittenhouse showed the Shackets the aircraft and handed them various manuals, the certificate of airworthiness, and the keys. The Shackets subsequently returned home in the new aircraft and have retained possession ever since.

The present controversy is in part generated by failure of Roger Smith, president of Smith Aircraft, to give the Shackets all the proper bills of sale reflecting the chain of title in the aircraft, and in part by Smith's "sale" of the same aircraft to two different parties. Telling the Shackets that the legal title could not be delivered at closing because of uncompleted clerical work, Smith supplied the buyer's copy of the bill of sale, and photocopies of bills of sale covering prior transfers of the aircraft and said he would "take care of the paperwork." The Shackets understood that to mean Smith would record the bills of sale as part of the "paperwork." No recording of the Shackets' interest was accomplished.

Through Smith, Edward McArdle learned of an aircraft operation (Philko) for sale at the Aurora Municipal Airport. McArdle purchased Philko, becoming its president and principal stockholder, and leasing its operations to Smith Aircraft. Under the lease arrangement, Smith Aircraft would continue existing operations under Philko's name, accounting to Philko for all expenses and receipts.[1] Smith Aircraft was permitted to use Philko's buildings for Smith Aircraft's used aircraft sales and charter business. McArdle extended his personal credit and the credit of his companies to assist

[1] The Philko operations included the sale of oil and gasoline, operation of a flight school, aircraft maintenance and repair, and the sale of new aircraft.

Smith Aircraft, guaranteeing $100,000 of its $500,000 line of credit and loaning it $80,000. When Smith approached McArdle concerning the Piper aircraft in question, Smith Aircraft owed Philko $60,000 on the loan.

Two days after closing with Shackets, Smith told McArdle he needed $152,000 to complete purchase of the same aircraft he had already sold and delivered to the Shackets, telling him the aircraft was to be sold to Krueger Aviation Inc., a California corporation (Krueger). Smith said the Bank would not advance funds to complete the transaction because an advance would exceed his line of credit and showed McArdle a copy of a purported purchase order signed by Krueger. Smith told McArdle the sale would enable him to erase the $60,000 debt to Philko.

After McArdle and the Bank examined the original prior bills of sale exhibited by Smith, and checked the title against Federal Aviation Administration (FAA) records, McArdle agreed that Philko would take title to the plane from Smith Aircraft. All the proceeds of the Krueger sale would be credited to Smith Aircraft ($152,000 being repaid to the Bank, $60,000 being applied to payment of the Philko loan, and the balance going to Smith Aircraft). The Bank subsequently recorded with the FAA the bill of sale to Philko and the Bank loan agreement, though Philko never received physical possession of the Piper aircraft.

Issues

1. Did the district court err in concluding that state law governs validity of the transfers of the aircraft?

2. Did the district court err in concluding that under state law the Shackets obtained title to the aircraft as a result of their purchase from Smith Aircraft?

3. Did the trial court err in concluding that under state law Philko did not obtain title to the aircraft?

4. Were there genuine issues of material fact sufficient to preclude grant of summary judgment to the Shackets?

OPINION

1. *Effect of the Shackets' Failure to Record*

Under the Federal Aviation Act of 1938 (Act), 49 U.S.C. §1401 et seq., Congress established a system for national registration of conveyances and encumbrances affecting aircraft. Registration entails filing an application for registration with the FAA in Oklahoma City, disclosing prescribed information about the owner, evidence of ownership, and a filing fee. Upon acceptance of the application, the interest is recorded and a certificate of registration issued. Section 1403 of the Act recites the broad range of conveyances included within the scope of the recording system and further provides at section c:

> §1403(c) No conveyance or instrument, the recording of which is provided for by [§1403(a)] shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator.

Philko argues that §1403(c) preempts state law and invalidates any conveyance of an aircraft without recordation. Any federal preemption however is limited by the terms of 49 U.S.C. §§1401(f) and 1406. The former provides that the FAA issued certificate of registration shall not be evidence of ownership in any proceeding where ownership is in issue. Congress indicated a further deference to state law in 1964 when it enacted §1406.

> §1406 The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered . . . .

The extent to which the Act effects priorities between claimants under successive transactions involving the same aircraft must therefore be limited. In *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086 (3rd Cir. 1978), the court noted:

> [T]here has been preemption by federal law only to the limited extent that Congress has sensibly federalized choice of law, thereby freeing aircraft financing from the forum shopping which the rule of *Klaxon Co. v. Stentor Elec. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), might otherwise produce.

Id. at 1088; also quoted in *Blitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App. 3d 1, 401 N.E. 2d 1340, 1345 (1980).

Since the enactment of §1406, numerous courts have adopted the view that the Act is subject to UCC principles of good faith purchaser status, actual notice, and the rights of a buyer in the ordinary course, as Judge Shadur determined the Shackets to be.[2] Thus, though the manner of recordation and choice of law question are resolved under the Act, the underlying validity and effect of an instrument are subject to applicable state law. We therefore conclude that the Act does not preempt all state laws governing priorities among

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[2] *E.g., Sanders v. M.D. Aircraft Sales Inc., supra; Blitzer-Croft Motors Inc. v. Pioneer Bank & Trust Co., supra; Haynes v. General Electric Credit Corp.*, 582 F.2d 869 (4th Cir. 1978); *State Securities Co. v. Aviation Enterprises*, 355 F.2d 225 (10th Cir. 1968); *No. Illinois v. Biship Distributing*, 284 F. Supp. 121 (D.C. Mich. 1968); *but see, Dowell v. Beach Acceptance Corporation, Inc.*, 3 Cal. 3d 544, 475 P.2d 401 (1970).

security interests, and that the interests of the parties in the aircraft in this case must be determined by reference to state law.

2. *The Shackets' Interest Under State Law*

The state law applicable to the sale of goods in Illinois is the Uniform Commercial Code (UCC).[3] UCC §1-201(9) defines a buyer in the ordinary course of business.

> (9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

Having paid Smith Aircraft $126,000 in cash and turned over possession of a trade-in aircraft, the Shackets are clearly "buyers" under §1-201(9) and purchasers who have given value under §§1-201(32), (44). As Judge Shadur noted, the good faith of the Shackets was demonstrated when they specifically asked Rittenhouse whether it was alright to close on the purchase, and were told that it was. The Shackets were under no obligation to monitor Smith Aircraft's financial arrangements with Clark, and therefore their failure to know of Smith Aircraft's outstanding financial obligations to Clark raises no issue of good faith.

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[3] Under §1406 of the Act, Illinois law governs the transaction between Clark, Smith Aircraft, the Shackets, Bishop and Philko. In each case the transaction took place, and the instrument evidencing the respective interests was delivered, in Illinois.

It is unquestioned that Clark had good title to the new aircraft, was in the business of selling new aircraft, and entrusted possession of the new aircraft to Smith Aircraft. That Smith Aircraft was only in the business of selling used aircraft, as Philko asserts, does not detract from its ability to transfer the good title of Clark to the Shackets. Under UCC §2-403(2) the effect of entrustment of goods to one who deals in goods "of that kind" is to pass all rights of Clark to the Shackets, as buyers in the ordinary course of business.[4] The term "goods of that kind" is not limited to the same goods but encompasses goods of the same fundamental nature. That Smith Aircraft was in the business of selling aircraft on a commercial basis is sufficient to permit Smith Aircraft to pass good title to a buyer in the ordinary course.

Illinois case law illustrates the effect of §2-403(2). In *Coffman Truck Sales v. Sackley Cartage Co.*, 58 Ill. App. 3d 68, 373 N.E.2d 1026 (1978), the Illinois Appellate Court applied that section, holding that a buyer from a resale dealer who purchases in an ordinary transaction is a buyer in due course and therefore obtains title of the first dealer, even if the resale dealer failed to remit payment for the goods to the first dealer.

Similarly, the Shackets, as buyers in the ordinary course from Smith Aircraft, obtained the title entrusted by Clark to Smith Aircraft, notwithstanding any difficulties in the title of Smith Aircraft.[5]

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[4] UCC §2-403(2) provides: "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business." *See also, Bank of Hendersonville v. Red Baron Flying Club, Inc.*, 571 S.W.2d 152 (Tenn. App. 1977), *cert. denied* (Tenn. 1978), *cert. denied*, 439 U.S. 1089 (1979), holding that the entrustment doctrine applies to sales of aircraft.

[5] As Judge Shadur noted, the Shackets could also predicate good title under UCC §2-403(1) as good faith purchasers for value who, upon delivery of the goods, have acquired good title notwithstanding any voidable title in Smith Aircarft.

Philko's argument that Smith Aircraft acted as an agent of the Shackets (and therefore could not have passed good title to them) ignores the evidence. In denying a motion to modify judgment, Judge Shadur quoted from his own opinion:

> [T]he mark of an agency relationship here would be that "if Smith Aircraft were acting as an agent and not as a principal for its own account, the purchase transaction with Clark, including the price of the aircraft as negotiated by Smith, would have been for the direct benefit of Shacket". . . . If an *agent* makes a deal for his principal, the price that the agent commits for is the price the *principal* pays. That was plainly not so here, where Smith Aircraft was plainly dealing for its own account in the purchase from Clark Aircraft.

Accordingly, we find no error in Judge Shadur's determination that the Shackets obtained title to the aircraft as a result of the purchase from Smith Aircraft.

3. *Philko's Interest Under State Law*

Philko's claim under state law is twice flawed: it cannot be a buyer in ordinary course; and its failure to take possession precludes acquisition of good title as a good faith purchaser for value.

"Buying" under UCC §1-201(9) specifically excludes transfers "as security for or in total or partial satisfaction of a money debt." Thus, a person may give "value" as defined in UCC §1-201(44) (which specifically includes acquiring rights "as security for or in total or partial satisfaction of a pre-existing claim"), yet not be a "buyer" for purposes of UCC §1-201(9).

Smith Aircraft owed Philko $60,000 on its $80,000 loan. Smith told Philko he could not obtain sufficient credit to buy the new aircraft, but if Philko would supply the purchase price, Smith Aircraft would resell the aircraft and repay both the purchase price and the $60,000 balance. As the district court noted:

> Thus it is plain from his own testimony McArdle had no interest in the sale price to be paid by Krueger Aviation, except to make sure it was adequate to pay the bank loan and the $60,000 balance owed to Philko. That is the conclusive hallmark of a *credit* transaction not a purchase. . . . Philko was acting to accommodate Smith Aircraft (though its purpose of course was the legitimate one of obtaining repayment of an existing debt), not to take the risks of profit and loss that are the essence of a true purchase. . . . Philko's acquisition of title was by way of security.

Because "buying" does not include a transfer as security, Philko cannot be a "buyer" in the ordinary course".[6]

Whether Philko has the status of a good faith purchaser is of no consequence. Such status of itself cannot be the basis for good title in this case absent possession of the aircraft. At the time of the "sale" to Philko, Smith Aircraft had neither title to nor possession of the aircraft. Consequently, Philko could not under UCC §2-403(1)[7] acquire good title from Smith Aircraft, whether

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[6] Moreover, there was at the time of the "sale" to Philko no entrusting of possession in Smith Aircraft to predicate the passage of title to Philko under UCC §2-403(2), *supra* at n.5.

[7] UCC §2-403(1) provides:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though
>
> (a) the transferor was deceived as to the identity of the purchaser, or
>
> (b) the delivery was in exchange for a check which is later dishonored, or
>
> (c) it was agreed that the transaction was to be "cash sale," or
>
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.

any voidable title that may have arguably accrued to Smith Aircraft because it retained the title papers or otherwise.

Accordingly, under state law, Philko acquired no title to the aircraft.

4. *No Genuine Issue of Material Fact*

Rule 56(c), Fed. R. Civ. P., provides that summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Philko asserts that six issues of material fact exist: (1) whether the Shackets were guilty of bad faith; (2) whether the Shackets were buyers in the ordinary course of business; (3) whether Smith Aircraft was in the business of selling goods of that kind; (4) whether there was an agency relationship between Smith Aircraft and the Shackets; (5) whether title to the trade-in aircraft passed; and (6) whether the proceeds from the proposed sale to Krueger inured to the benefit of Philko or Smith Aircraft.[8]

Respecting (1) and (5), Philko questions the honesty of the Shackets, suggesting that there might have been additional terms in the Shackets-Smith Aircraft transaction that were not stated in the record, noting particularly the Shackets' retention of title to the trade-in aircraft pending delivery of title to the new aircraft. Philko suggests that the Shackets and Smith Aircraft might have agreed that title would not pass until the exchange of the legal title papers. That conjecture, however, is an insufficient response to the direct evidence demonstrating the Shackets' good faith at the time of the transaction, as indicated by payment in full,

[8] Mere allegations or denials in the pleadings are insufficient to establish genuine issues for trial. Rule 56(e) Fed. R. Civ. P.

upon approval of Rittenhouse, and their understanding that the "paperwork" was being completed by Smith Aircraft. No issue of material fact touching the Shackets' good faith has been shown to exist.

Assertions (2), (3), and (4), relate not to fact issues but to legal conclusions drawn in this case from undisputed evidence in the record. Philko's suggestion that factual disputes may underlie resolution of those issues is a poor substitute for record evidence that would conflict with Judge Shadur's determinations. Philko's assertions (2), (3), and (4) fail to demonstrate existence of any issue of material fact.

Assertion (6) was resolved in the testimony of McArdle.

> [Smith said] that he had sold an airplane to Krueger Aviation . . . for $280 or $290 [thousand dollars] . . . [Smith] said that he wanted—he had gone to the bank and requested financing for the balance of the purchase of $152,000. And the bank told him that if they loaned him $150,000 it would be beyond his line of credit, words to that effect. . . . and he said that if I purchased this airplane, when this buyer, Krueger Aviation, was going to purchase—would purchase the thing from me, witnessed the fact that I had a contract here signed by Krueger, I would receive my $152,000 or whatever it was plus the $60,000 from the proceeds of the sale. And of course the difference—it would be profit to him and Krueger, I guess.

Philko points to no evidence in the record to contradict the obvious conclusion that, at least in McArdle's mind, Smith Aircraft was to receive all of the profit on the purported resale to Krueger. Philko's assertion (6) therefore fails to demonstrate any issue of material fact sufficient to preclude summary judgment to the Shackets.

There being no error in Judge Shadur's grant of summary judgment to the Shackets, the same is affirmed.

A true Copy:
Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAURICE SHACKET and
SYLVIA SHACKET,
Plaintiffs,

v.

ROGER SMITH AIRCRAFT
SALES, INC., et al.,
Defendants.

PHILKO AVIATION, INC.,
Counter-Plaintiffs,

v.

MAURICE SHACKET, et al.,
Counter-Defendants.

SANDWICH STATE BANK,
Counter-Plaintiff,

v.

MAURICE SHACKET, et al.,
Counter-Defendants.

No. 78 C 4284

DECLARATORY JUDGMENT ORDER

This matter coming upon to be heard for entry of declaratory judgment order, the Court having rendered a Memorandum Opinion and Order dated September 22, 1980, which granted plaintiffs Maurice and Sylvia Shacket's motion for summary judgment on Count I of the complaint against Philko Aviation, Inc. and Sandwich State Bank and further granted summary judgment for Philko Aviation, Inc. and Edward J. McArdle on Count II of the complaint; and a default judgment against the other defendants, Roger Smith and Roger Smith Aircraft Sales, Inc., having been entered on December 18, 1980 and the Court having rendered a Memorandum Opinion and Order dated January 19, 1981, denying in principal part the motion of Philko Aviation, Inc. for modification of its September 22, 1980 Memorandum Opinion and Order; and the Court being fully advised in the premises;

It is hereby ordered, adjudged and decreed that:

1. Judgment is hereby entered in favor of plaintiffs Maurice and Sylvia Shacket and against defendants Philko Aviation, Inc. and Sandwich State Bank upon Count I of the Complaint, with costs as to said Count to be allowed to plaintiffs.

2. Plaintiffs Maurice and Sylvia Shacket are the true and lawful owners of all right, title and interest in and to a certain Piper PA-31 aircraft, Serial Number 31-7812074, with a FAA Registration No. N78 M.S. (the "Aircraft").

3. Defendant Philko Aviation, Inc. does not have any right, title or interest in or to the Aircraft, and the Bill of Sale recorded by Philko Aviation, Inc. as owner as FAA Document No. C-172546 is a nullity.

4. Defendant Sandwich State Bank does not have any right, title or interest in or to the Aircraft, and Trust Receipt-Security Agreement filed by Sandwich State Bank as FAA Document No. 172547 is a nullity.

5. Defendants Philko Aviation, Inc. and Sandwich State Bank, their directors, officers, shareholders, agents and employees and all persons acting through and under said defendants are hereby enjoined from directly or indirectly interfering with, converting, hypothecating or otherwise affecting the right, title and interest of plaintiffs Maurice and Sylvia Shacket in and to the Aircraft.

6. Plaintiffs Maurice and Sylvia Shacket are authorized to file a certified copy of this Declaratory Judgment Order with the appropriate agencies to record their ownership rights in and to the Aircraft.

7. Judgment is hereby entered in favor of defendants Philko Aviation, Inc. and Edward J. McArdle and against plaintiffs Maurice and Sylvia Shacket upon Count II of the Complaint, with costs as to said Count to be allowed to said defendants.

8. Judgment is hereby entered in favor of counterdefendants Maurice and Sylvia Shacket upon the Counterclaims filed by counterplaintiffs Philko Aviation, Inc. and the Sandwich State Bank, with costs as to said Counterclaims to be allowed to said counterdefendants.

/s/ Milton I. Shadur
United States District Judge

Date:

APPENDIX C

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAURICE SHACKET and SYLVIA SHACKET,
Plaintiffs,
v.
ROGER SMITH AIRCRAFT SALES, INC., et al.,
Defendants.

PHILKO AVIATION, INC.,
Counter-Plaintiffs,
v.
MAURICE SHACKET, et al.,
Counter-Defendants.

SANDWICH STATE BANK,
Counter-Plaintiff,
v.
MAURICE SHACKET, et al.,
Counter-Defendants.

No. 78 C 4284

MEMORANDUM OPINION AND ORDER

This action involves a dispute over the ownership of a Piper Navajo airplane sold twice by defendants Roger Smith ("Smith") and Roger Smith Aircraft Sales, Inc. ("Smith Aircraft").[1] Plaintiffs Maurice and Sylvia Shacket ("Shackets"[2]) are in possession of the plane and have asked this Court in Count I for a declaratory judgment that they own the plane free of any claims of defendants. Defendant Philko Aviation Company ("Philko") has counterclaimed asserting its ownership of the plane. Defendant Bank has claimed a lien if the plane is owned by Philko. Shackets have also alleged in Complaint Count II that Philko aided Smiths in seeking to defraud Shackets of their interest in the plane and that all defendants have engaged in fraudulent conversion. Counterclaims have been filed by Philko and Bank.

Shackets and Philko have filed cross-motions for summary judgment on Count I, and Philko and defendant Edward McArdle ("McArdle"), its president and principal shareholder (through a holding company), have moved for summary judgment on Count II. For the reasons stated in this memorandum opinion and order, Shackets' motion for summary judgment as to Count I is granted (and Philko's is denied), and the Philko-McArdle motion for summary judgment as to Count II is also granted.

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[1] Throughout the transactions involved in the case Smith was the president and principal shareholder of Smith Aircraft, whose business was the buying and selling of aircraft. It was thinly capitalized and heavily financed. It had in late 1977 and early 1978 sold three other aircraft out of trust, a matter discovered by defendant Sandwich State Bank ("Bank") in May 1978 when it made a floor plan check on the five aircraft (including the three that proved to have been improperly sold) it was currently financing for Smith. For convenience, Smith and Smith Aircraft are sometimes collectively referred to in this memorandum opinion as "Smiths."

[2] Maurice Shacket ("Shacket") was involved in all of the negotiations and closed the transaction on behalf of plaintiffs.

Facts

1. *The First Sale.*

Shacket, a private pilot and owner of aircraft for many years, contracted with Smith Aircraft in 1977 to buy a custom-built Piper Navajo plane for $126,000 plus the trade-in of a plane currently owned by Shacket, the wholesale value of which was $120,000. Shacket paid $20,000 down on the purchase price upon signing the contract with Smith Aircraft. Smith Aircraft in turn contracted to acquire the plane from Clark Aviation, Inc. ("Clark," the Piper franchisee for the area), an arrangement of which Shacket was aware. Before the closing of Shacket's purchase of the plane, Smith located a customer for his resale of the trade-in aircraft, and Shacket turned over possession of the trade-in aircraft for delivery to Smith's customer. After completion of the necessary work on the Piper Navajo to meet Shacket's specifications, the closing was set for April 18, 1978.

As of the closing date Smith Aircraft had not been able to pay Clark for the plane to be sold to Shacket,[3] but that did not prevent the closing from taking place on April 19. Closing involved a meeting at an airport attended by Shacket, Smith and Clark's president and principal shareholder, Kenneth Rittenhouse ("Rittenhouse"). Rittenhouse had previously told Shacket of financial problems Clark had encountered with Smith Aircraft (the delivery of one, or perhaps two, NSF checks). As a special request Rittenhouse had told Shacket that he wanted to be present at the closing and that Shacket should not pay Smith Aircraft for the plane unless Rittenhouse were there.

At the closing Shacket asked Rittenhouse whether it was all right to close the purchase of the plane and

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[3] There is a dispute as to whether Smith paid any money at all to Clark. Shackets allege that $3,000 was paid, with all subsequent checks being returned for insufficient funds. Defendants claim that all of the checks from Smith to Clark were returned for insufficient funds. That dispute does not raise any issue as to a material fact.

Rittenhouse said it was. Shacket then endorsed two cashiers' checks aggregating $106,000 in favor of Smith Aircraft. Rittenhouse and Smith showed Shacket the plane, turned over to Shacket various manuals and the certificate of airworthiness and handed the keys to Shacket. Shacket flew the plane to Detroit and has had possession ever since.

Essentially the problem in this case has been generated by Smith's failure at the closing to give Shacket all the proper bills of sale reflecting the chain of title to the plane. Smith did give Shacket the buyer's copy of the bill of sale from Smith Aircraft to Shacket, together with photocopies of the bills of sale covering prior transfers of the plane, and told Shacket that Smith would "take care of the paperwork." Shacket understood that to include an undertaking by Smith to record the bills of sale as part of the "paperwork."

There is a central registration system for aircraft conveyances under the Federal Aviation Act (the "Act"). Such registration requires the original bill or bills of sale covering the chain of title. After the closing Shacket made several attempts to get the prior bills of sale from Smith but was unsuccessful. Thus Shacket was unable to register his purchase with the Federal Aviation Administration (the "FAA").

2. *The Second Sale.*

Before the events described in the prior section, McArdle had been pressuring Smith to repay the remaining balance of $60,000 on Philko's $80,000 loan made to Smith Aircraft in December 1977. On April 18, 1978, the same day that Shacket arrived in Aurora for his closing the following day, Smith came to McArdle and represented that he had contracted with Clark to purchase a plane (which was in fact the same plane about to be paid for by and delivered to Shacket) for resale to a third party, Krueger Aviation. Smith claimed to have tried to borrow $152,000 from Bank on the plane but to have been refused because that would have exceeded his line of credit with Bank.

After McArdle and Bank had examined the original bills of sale that Smith exhibited, McArdle agreed that Philko would take title to the plane from Smith Aircraft, enabling it to obtain the same $152,000 loan from Bank to be secured by that title, and then to complete Smith Aircraft's previously committed sale to Krueger Aviation. All the proceeds of the Krueger sale would be credited to Smith Aircraft (with $152,000 of those proceeds being contemporaneously repaid to Bank, $60,000 being applied in payment of the prior Philko loan to Smith Aircraft, and the balance belonging to Smith Aircraft).

On April 22, 1978, just two days after the Shacket transaction, Philko executed its note for $152,000 to Bank, which in turn issued its cashier's check for that amount to Clark. Bank showed the remitter on the cashier's check as "Roger Smith Aircraft Sales, Inc. (Philko Aviation, Inc.)." On April 24, 1978 Smith Aircraft executed a bill of sale to Philko (the same date appears on all of Bank's security documents other than the Philko note to Bank, which was dated April 22).

At that point Bank had all of the original bills of sale establishing the paper chain of title in its possession (a series of bills of sale running from Piper Aviation to North States Aviation [the Piper distributor for the area] to Clark to Smith Aviation to Philko). All those documents were then transmitted by Bank to the Federal Aviation Administration for recording. Bank delayed that transmittal for a period of time. Its reason for delay was that where another sale of an aircraft is expected to be made, the administrative delay in recording earlier bills of sale can cause problems in implementing the subsequent sale. In any case, the present situation is that Shacket has the physical possession of, while Philko has the FAA registered title to, the plane.[4]

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[4] From the facts stated by the parties, it is the Court's understanding that the Krueger Aviation transaction promised by Smith never proceeded, but that fact is not critical to decision of the pending motions.

3. *Prior Relationships Among the Defendants.*

McArdle, the owner of a large number of corporations through his holding company McArdle, Ltd., first met Smith in 1976 or 1977 when McArdle was contemplating the purchase of corporate aircraft. In about April 1977 Smith, who wanted to acquire a new base of operations, learned about the availability for sale of the corporation that was lessee of the Aurora Airport from the City of Aurora. Because he didn't have funds to make the deal himself but regarded it as a good buy, Smith approached McArdle as a possible financial backer. Smith proposed that McArdle purchase the operation and lease it to Smith Aircraft on terms that would make it a good investment.

McArdle investigated Smith Aircraft's financial viability (including having an audit performed). He found that Smith Aircraft did a large volume of business but lacked operating capital and needed added credit to carry on its purchases of planes. Having satisfied himself on that score, McArdle caused one of his corporations to purchase the Airport lessee (which became Philko by corporate merger) and caused Philko contemporaneously to sublease the Airport to Smith Aircraft for a five year term.

Smith Aircraft became more than a sublessee of Philko as a result of the April 1977 transaction, although the document the parties executed was termed a "Lease Agreement." In its sublessee capacity, Smith Aircraft agreed to make all the rental payments to the City of Aurora, and to perform all other obligations imposed on Philko as lessee, under the leases from the City; that much of course represented a conventional lessor-lessee relationship. But the parties also contracted for Smith Aircraft to conduct several related businesses *in Philko's name*, to be carried out by Smith Aircraft's own personnel:

1. the purchase and sale of aviation fuel and lubrication oils;
2. the operation of the flight school at the airport;

3. rendering of maintenance services; and
4. sales of *new* Piper aircraft.

Smith Aircraft was "permitted to do business *in its own name* as a purchaser and seller of *used* aircraft." For a period of approximately 1½ years thereafter Philko purchased aircraft for its corporate use from Smith Aircraft (which purchased such aircraft for its own account and resold them to Philko), and Smith Aircraft also carried out the sale of Philko's aircraft inventory in the same manner (it was not paid a commission as though it were a broker). During the same period McArdle also entered into two major financing transactions to assist Smith Aircraft (in addition to the April 1978 transaction discussed above in "The Second Sale"):

1. the guaranty of $100,000 of Smith Aircraft's $500,000 line of credit with Commercial Credit Equipment Corporation, entered into at the same time as the April 1977 lease and other arrangements; and
2. the loan of $80,000 in December 1977, secured by the personal guaranties of Smith and his wife and by their pledge of the stock of Smith Aircraft.

Indeed, one portion of the April 1977 "Lease Agreement" was (taken in the light *most favorable* to Philko) still another financing of—that is, an extension of credit to—Smith Aircraft's operations. This was the provision under which Smith Aircraft was (1) to "provide its personnel for the operation of [Philko's] sale of aviation fuel and lubrication oils, which operation shall be conducted only in the name of [Philko] as provided below," and (2) to remit to Philko, within ten days after the end of the month of *sale* of such materials, the cost of all such materials purchased in Philko's name plus the amounts due to the City of Aurora by reason of such sales.

In still another aspect of the Smith-McArdle relationships, McArdle proposed in December 1977 to purchase the stock of Smith Aircraft, and Philko made a payment of $5,000 as an advance toward such possible

purchase. That transaction was not consummated and the $5,000 was repaid early in 1978, so that at the time of the April 1978 transactions Smith still owned the stock of Smith Aircraft subject to the pledge to Philko.

As for the Bank-Smiths relationships, Smith Aircraft had established a floor plan arrangement with Bank beginning in 1974. As already stated, Smith's capital investment in Smith Aircraft has always been small, and Smith Aircraft experienced intermittent cash shortages from 1972 through 1978. Smith Aircraft's out-of-trust sale of aircraft financed by Bank has also been referred to earlier. Bank itself was experienced in airplane financing transactions, having handled about 100 since 1974 and having carried on two floor plan arrangements since 1974 involving substantial numbers of aircraft.

We turn then to the parties' respective motions in light of the facts as just summarized.

Shackets' Status as Good Faith Purchasers

Ordinarily the law applicable to the sale of goods is the UCC (the Illinois version, Ill. Rev. Stat. ch. 26, §§ 1-101 ff., is hereinafter cited to the UCC section numbers). Here however the threshold question is whether the registration provisions of the federal Act for aircraft conveyances preempt the UCC for purposes of determining title questions relating to aircraft. From its inception in 1938 the Act was intended to unify title registration for airplanes and eliminate the confusing array of state statutes (a purpose especially appropriate in light of the great mobility of the subject matter). In dealing with priorities between claimants under successive transactions involving the same aircraft, courts have reached differing results as to the precise effect of the Act. Professor Gilmore has said that its provisions "obviously amount to a good deal more than a recording system . . . but are still a good deal less than a comprehensive coverage of security interests in aircraft. . . ." 1 Gilmore, *Security Interests in Personal Property* 546-48 (1st ed. 1965).

But as between the parties to a transaction themselves, there appears to be no question that state law

governs to determine the validity of the transfer from Smith Aircraft to Shackets.[5] We therefore turn to the UCC.

In that respect the first question is whether the sale to Shackets was valid in view of the fact that Smith Aircraft had never paid for the airplane built by Clark. On the record as presented to the Court, the conveyancing instruments bringing title to the plane up to Clark were in existence and copies were exhibited to Shackets at the closing. In those circumstances the Smith Aircraft-Shackets transaction can be validated under the UCC either on a theory of voidable title or entrustment.

Although the general rule is that a transferor can give no better title than he has himself, UCC §2-403 provides several exceptions. Under Section 2-403(a)(c) a purchaser acquires voidable title "When goods have been delivered under a transaction of purchase . . . even though . . . (c) it was agreed that the transaction was to be a cash sale . . ." As stated in J. Fonseca and A. Squillante, *Williston on Sales* §23-13 (4th ed.):

> The basic rule of the cash sale is that the transferor purchaser from the true owner has the ability to transfer a good title to a good faith purchaser for value even though that transferor purchaser never in fact paid for the goods.

Alternatively UCC §2-403(2) states, "Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in the ordinary course of business." *Williston on Sales* §23-14 summarizes the principles involved:

> Entrusting has four essential elements. First, there must be an actual entrustment of the goods by the

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[5] Section 1403(c) of the Act provides that no conveyance or instrument whose recording is provided for "shall be valid in respect of such aircraft . . . against any person *other than the person by whom the conveyance or other instrument is made or given* . . ." (emphasis added). It may be noted, though the issue is not the same, that Section 1406 provides that the validity of recordable instruments is to be governed by state law.

> delivery of possession of those goods to a merchant. Second, the party who receives the entrustment of those goods must be a merchant who deals in goods of that kind. Third, that merchant who deals in goods of that kind must make a sale of those goods. Fourth, the sale which the entrusted merchant makes must be to a buyer in the ordinary course of business.[6]

On the day of the closing, President Rittenhouse of Clark flew the Piper Navajo to the airport where the closing took place. It is undisputed that Shacket asked Rittenhouse at the closing whether it was all right to pay the money to Smith Aircraft and Rittenhouse responded affirmatively. Clearly Clark, through Rittenhouse, either entrusted the goods or gave voidable title to Smith Aircraft (which was equally clearly a merchant dealing in aircraft).

Doctrines of voidable title and entrustment do not protect all purchasers. To secure good title from a party who has only voidable title, one must be a good faith purchaser for value. Similarly, to secure good title from a party who has been entrusted with goods, one must be a buyer in the ordinary course of business. UCC § 1-201(9) defines a buyer in the ordinary course of business as one who buys "in good faith without knowledge that the sale is in violation of the ownership rights or security interest of a third party. . . ." Thus to be protected by either the voidable title or the entrustment doctrine, Shackets were required to have been purchasers in good faith.

Defendants first assert that Smith Aircraft was an agent of Shackets authorized to purchase an airplane from Clark. But an agency relationship is a consensual

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[6] In the analogous area of automobile sales, it is well settled that a sale will be upheld even though the certificate of title has not been transferred. See for example *Humphrey Cadillac & Oldsmobile Co. v. Sinard*, 85 Ill. App. 2d 64 (1st Dist. 1967); *Wood Chevrolet Co., Inc. v. Bank of the Southeast*, 353 So. 2d 1350 (Ala. 1977).

agreement whereby a principal authorizes an agent to bind him to a contractual relationship; in the context of this action if Smith Aircraft were acting as an agent and not as a principal for its own account, the purchase transaction with Clark, including the price of the aircraft as negotiated by Smith, would have had to be for the direct benefit of Shacket. To support their argument defendants offer only a copy of a December 2, 1977 letter from Smith Aircraft to Shacket enclosing, as "the specifications for your 1978 C/R Navajo," a copy of a two-page Clark-Smith Aircraft document captioned "Agreement To Purchase." However, mere knowledge on the part of Shacket that Smith Aircraft had to purchase the plane to be sold to Shackets does not create an inference of an agency relationship. There was no disclosure to Shacket of Smith Aircraft's purchase price from Clark, and the financial dealings between Shacket and Smith Aircraft were wholly buyer-seller in nature. Defendants have failed to offer any evidence that, even together with reasonable inferences, might raise a material factual question as to the existence of an agency relationship.

Defendants also allege a lack of good faith on the part of Shacket. UCC §1-201(19) defines good faith as "honesty in fact in the conduct of transaction concerned." This language has been universally interpreted as mandating a subjective test based on what the party actually believed. *Walter E. Heller & Co. v. Convalescent Home*, 49 Ill. App. 3d 2 (5th Dist. 1977).[7]

Shackets assert that good faith has been proved by the following facts: Shacket paid $126,000 in cash to Smith and delivered his own former airplane as a trade-in (these factors of course also go to establish Shackets' status as purchasers); and at the closing Shacket specifically asked Rittenhouse whether it was all right

[7] Defendants' citation of *Hollywood National Bank v. International Business Machines Corp.*, 113 Cal. Reptr. 494 (2d Dist. 1974), construing the critically different California version of the UCC, is entirely inapropos.

to close the purchase and was told that it was. (Rittenhouse said nothing about Shacket's not doing so because Smith Aircraft had not paid Clark for the plane). Defendants charge bad faith on the basis of the following facts: Shacket refused to deliver the bill of sale on the trade-in plane (defendants argue that this shows Shacket's doubts about Smith's ability to convey title); Shacket tried several times after the closing to get the bill of sale from Smith; Shacket had long been aware of the registration requirement and its importance; Shacket tried after the closing to get new bills of sale from Rittenhouse; and Shacket was aware before the closing that Smith Aircraft was having trouble paying for the plane.

All of defendants' arguments based on post-closing events (Shacket's efforts to get the bill of sale from Smith or new bills of sale from Rittenhouse, and Shacket's non-delivery of a bill of sale on the trade-in plane) do not raise a genuine issue of material fact as to Shacket's good faith at the closing. Whether or not a purchaser was in good faith at the time of purchase, his inability to get the title documents needed for recording would have elicited exactly the same efforts. And the same is true of the trade-in transaction.[8] As for

[8] Shacket actually surrendered possession of his trade-in plane for delivery to Smith Aircraft's customer *before* the closing. It was *after* the closing, when Shacket could not obtain the documents on the Smith Aircraft plane, that he withheld the bill of sale on the trade-in aircraft. Defendants prove too much when they seek to draw inferences as to Shacket's good faith from the fact that the delivery of an aircraft, or the payment for a purchased aircraft, is not made contemporaneously with delivery of the conveyancing document covering the aircraft. As noted in the factual summary contained in this opinion, Philko itself turned over $152,000 to Smith Aircraft on April 22 but the bill of sale from Smith Aircraft was dated April 24 (as were the Bank's security documents other than the $152,000 note). Do defendants contend that this demonstrates Philko's lack of good faith as a purchaser—or that if Smith had unlawfully sold the plane a third time, Philko's inability to obtain the Smith Aircraft bill of sale on April 24 would have shown that it was in bad faith at the time it made payment on April 22?

Shacket's awareness of Smith Aircraft's financial problems, Shacket had no obligation to monitor Smith Aircraft's financial arrangements with Clark (a matter between those two parties), and Shacket's failure to do so does not bear on the issue of his good faith. Instead, Rittenhouse's response to Shacket at the closing that it was all right to proceed—after Rittenhouse had specifically asked to be present—conclusively rejects any lack of good faith, which the parties agree is the material fact on this issue (citing *Tumber v. Automation Design & Mfg. Co.*, 130 N.J. Super. 5, 324 A. 2d 602 (1974)).

Accordingly the Court finds that there is no genuine issue of any material fact regarding Shackets' good faith in purchasing the plane. Shackets are held to have been bona fide purchasers of the plane for value and in the ordinary course of business, and therefore to have secured good title to the plane from Smith Aircraft.

Philko's Status as a "Purchaser"

Shacket's status as a good faith purchaser does not end the matter. Defendants' motion for summary judgment argues that Philko is the sole owner of the plane (subject to the lien in favor of the Bank) even if Shacket acted in good faith. They assert that Shacket's failure to record the transaction with the FAA rendered the sale void as to third parties. Shackets, on the other hand, interpret the Act as also requiring the use of state law in determining the "*priorities*" between the two "purchasers" from Smith Aircraft. Because title to goods generally passes on transfer of possession, Shackets argue that they acquired "good title" to the plane and Smith Aircraft therefore had nothing left to convey to Philko.

In the Court's view, it is not necessary to resolve this dispute over the legal effect of recording or non-recording under the Act as between *purchasers* from the same party. That issue need not be reached because,

based on McArdle's own statements, Philko is not a "purchaser" at all.[9]

Both parties have glossed over (perhaps understandably in the case of defendants' counsel) the full statement of the key fact, acknowledged by McArdle, that the *entire* economic benefit of the Krueger Aviation purchase (not just the $60,000 used to pay off Smith Aircraft's debt to Philko) was going to go to *Smith Aircraft* not Philko. McArdle clearly stated in his deposition that all the funds from the sale, after paying the $152,000 bank loan entered into to obtain the aircraft from Clark, would inure to Smith Aircraft: $60,000 to pay off the loan from Philko, and the very substantial balance (perhaps $68,000 to $78,000) to Smith Aircraft directly.

In his deposition, McArdle said that Smith had called him to ask for a meeting. At the meeting (emphasis added):

> [Smith said] that he *had sold* an airplane to Krueger Aviation . . . for $280 or $290 [thousand dollars] . . . [Smith] said that he wanted—he had gone to the bank and requested financing for the balance of the purchase of $152,000. And the bank told him that if they loaned him $150,000 it would be beyond his line of credit, words to that effect. . . . and he said that if I purchased this airplane, when this buyer, Krueger Aviation, was going to purchase—would purchase the thing from me, witnessed the fact that I had a contract here signed

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[9] Shackets make a related contention based on the fact that "buying" under UCC §1-201(9) "does not include a transfer . . . in total or partial satisfaction of a money debt." But the Philko-Smith Aircraft transaction wasn't simply "in total or partial satisfaction of a money debt"—the $60,000 owed to Philko. That provision literally applies where no new consideration, no fresh money, is advanced by the buyer. If the Philko-Smith Aircraft transaction were in fact a purchase, the fact that in addition to the satisfaction of debt another $152,000 was paid in cash would give Philko the status of a "buyer."

> by Krueger, I would receive my $152,000 or whatever it was plus the $60,000 from the proceeds of the sale. And of course the difference—it would be profit to him and Krueger, I guess.

When in response to the last statement McArdle was asked "Profit to him and Krueger?" he responded:

> Well, profit to him [Smith]. And Krueger was a dealer and he was selling it to somebody subsequent to that. . . . I said that the papers all appear to be in order, etc., that I would sign the note and borrow the money to complete this transaction and take title to the airplane.

McArdle testified that he then called the Bank:

> I think that I verified that Roger Smith couldn't borrow the money because it would exceed his credit or something like that. . . . I think that I called from my office saying to Mr. Andrews [of the Bank] that Roger Smith was bringing out a series of documents and a note signed by me; you follow? For him to check over the documents and so forth to find out if he had all the items that he needed for to make this loan.

Thus it is plain from his own testimony McArdle had no interest in the sale price to be paid by Krueger Aviation, except to make sure it was adequate to pay the bank loan and the $60,000 balance owed to Philko. That is the conclusive hallmark of a *credit* transaction not a *purchase*.

Philko was taking title with the anticipated quick retransfer to Krueger Aviation[10] only because Bank required a credit-worthy borrower as a condition to making its loan. Philko was acting to accommodate Smith Aircraft (though its purpose of course was the legitimate one of obtaining repayment of its existing debt), not to take the risks of profit and loss that are the essence of a

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[10] This anticipation is confirmed by Andrews' statement as to the reason he did not immediately send the chain of title documents to the FAA.

true purchase.[11] This situation is no different from the frequent disputes stemming from a lender's taking absolute title to property, which the courts uniformly treat as an equitable mortgage as a matter of law. Philko's acquisition of title to the plane was by way of security. It cannot shift to Shackets the consequences of the noncompletion of the Krueger transaction that Philko had relied on in agreeing to accommodate Smith.

Under UCC §1-202(9) "buying" specifically does not include a transfer as security. Thus Philko cannot be a buyer in the ordinary course of business or a good faith purchaser under the UCC; it can only be a secured party. This case then presents a conflict between a "bona fide purchaser," who failed to record a transaction, and the holder of a subsequently recorded security interest. It appears that only one case under the Act has dealt specifically with this issue, and the case enforced the subsequent lien. *Marsden v. Southern Flight Service, Inc.*, 227 F. Supp. 411 (D.C.N.C. 1961). Although there have not been any subsequent cases that have dealt with this precise issue, the weight of subsequent authority (particularly since Section 1406 was added to the Act in 1964) has undermined the reasoning of this opinion.

Nearly all of the courts agree that a bona fide purchaser takes title free of a *prior* recorded security interest. *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App. 3d 1, 401 N.E. 2d 1340 (5th Dist. 1980); *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F. 2d 1086 (3d Cir. 1978); *Hayes v. General Electric Corp.*, 432 F. Supp. 763 (W.D. Va. 1977), *aff'd per curiam*, 582 F. 2d 869 (4th Cir. 1978); *Northern Illinois Corp. v. Bishop Distributing*

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[11] This Court does not accept Shackets' argument that the numerous relationships between McArdle and Philko on the one hand and Smith and Smith Aircraft on the other were such as to negate Philko's good faith purchaser status as a matter of law. But the other transactions in which McArdle and Philko directly provided Smith and Smith Aircraft with, or assisted them in obtaining, credit are clearly relevant to support the uncontradicted evidence—from McArdle himself—that this transaction was another extension of credit.

Co., 284 F. Supp. 121 (W.D. Mich 1968); *Texas National Bank of Houston v. Aufdeheide*, 235 F. Supp. 599 (E.D. Ark. 1964); *contra*, *Dowell v. Beech Acceptance Corp.*, 3 Cal. 3d 544, 476 P. 2d 401 (1970), *cert. denied*, 404 U.S. 823 (1971). These courts have reasoned that while the Act pre-empts all state aircraft registration systems, it does not override basic state law principles governing priorities among conflicting interests. If a bona fide purchaser takes title free of a *prior* recorded security interest, it would follow *a fortiori* that the holder of a *subsequently* recorded security interest cannot challenge the title of a bona fide purchaser.[12]

Under the circumstances of this case, then, there is also no genuine issue of material fact on the issue of whether Philko was a good faith purchaser or otherwise entitled to priority as against Shackets. It was not, as a matter of law.

Count II of the Complaint

Shacket alleges in Complaint Count II that Smith and McArdle were business partners; that Smith had some interest in Philko; that Philko and McArdle were aware that the Shackets owned the plane when Smith Aircraft

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[12] On the issue of bona fides, it should be noted that McArdle, though intimately aware of Smith Aircraft's undercapitalization and major financial difficulties (indeed, it was due to the overdue $60,000 loan, on which McArdle had been pressing for payment, that Smith came to McArdle with the proposal regarding the plane), simply accepted without any effort at verification the story that Smith Aircraft had its equity already invested in the plane. It should be remembered that Smith Aircraft lacked possession of the plane at that time as well. Had McArdle made the single inquiry of Rittenhouse as to either the story regarding the equity investment or the plane's whereabouts, the Shackets' rights would have been disclosed immediately (unless Rittenhouse were to choose to conspire in Smith's fraudulent conduct). This Court's decision does not, however, rest on any adverse inferences from those facts (which could properly be taken if only defendants had moved for summary judgment).

executed the bill of sale to Philko; that Philko aided and abetted Smith and Smith Aircraft in attempting to defraud the Shackets; and that Philko and McArdle joined Smith and Smith Aircraft in the illegal and fraudulent conversion of the Shackets' property. Except for the issue of conversion, which is a matter of law and follows from the matters already discussed in this opinion, there is no evidence in support of the allegations in Count II.[13] Certainly there is no showing of fraud or a knowing interference with the Shackets' rights by Philko or McArdle.

Defendants' memorandum in support of the McArdle-Philko cross-motion for summary judgment regarding Count II was not responded to by Shackets. Accordingly the Court finds there is no genuine issue of any material fact regarding the subject matter of Count II.

Conclusion

This Court finds that there is no genuine issue as to any material fact in this action, that plaintiffs are entitled to judgment as a matter of law with respect to Count I and that defendants Philko and McArdle are entitled to judgment as a matter of law with respect to Count II. Counsel are directed to submit a form of final judgment for entry by the Court on or before September 29, 1980.

/s/ Milton I. Shadur
United States District Judge

Date: September 22, 1980

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[13] At the Shacket-Smith Aircraft closing, Rittenhouse told Shacket that Smith had a partner named Philko. Sometime after both "sales," McArdle told Shacket there was money owed on the plane. Neither of those facts creates an issue of fact supporting the allegations of Count II.

APPENDIX D

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

MAURICE SHACKET and
SYLVIA SHACKET,
Plaintiffs,

v.

ROGER SMITH AIRCRAFT
SALES, INC., et al.,
Defendants.

PHILKO AVIATION, INC.,
Counter-Plaintiffs,

v.

MAURICE SHACKET, et al.,
Counter-Defendants.

SANDWICH STATE BANK,
Counter-Plaintiff,

v.

MAURICE SHACKET, et al.,
Counter-Defendants.

No. 78 C 4284

MEMORANDUM OPINION AND ORDER

Defendant Philko Aviation, Inc. ("Philko") has filed a "Motion pursuant to Rule 60(b) for modification of the Order of Court granting the plaintiffs' Motion for Summary Judgment."[1] For the reasons stated in this memorandum opinion and order, Philko's motion is granted to a limited extent but is denied in all principal respects.

Payment of Value by Shackets

There is no question that Shackets paid value for the aircraft. Philko's arguments to the contrary do not reach the level of surface plausibility needed to characterize them as even specious, for Philko ignores entirely Shacket's payment of *$126,000* in *cash* in addition to his delivery of possession of a trade-in plane worth another *$120,000* at wholesale. Indeed, even on the latter score what Philko seeks to rely on are statements by Shacket in December 18, 1979 answers to interrogatories in a Minnesota state court action.[2] There Shacket's claim

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[1] Philko's motion was filed 80 days after the Court's September 22, 1980 memorandum opinion and order (the "Opinion") granting plaintiffs' motion for summary judgment as to Count I of the Complaint. If Philko's motion were literally under Fed. R. Civ. P. ("Rule") 60(b), the Court would be disposed to hold that it had not been timely filed under Rule 59(e) and had not been "made within a reasonable time" under Rule 60(b) and was therefore not sustainable. But plaintiffs did not, as the September 22 Opinion directed, submit a definitive form of final judgment and order for entry by the Court. Because other claims were involved in the action, the Opinion did not constitute a *final* judgment (see Rule 54(b)), and Rule 60(b) thus appears to be inapplicable.

[2] Philko did not initially submit that interrogatory answer as one of the documents it relied on in opposition to Shackets' summary judgment motion or in support of Philko's own cross-motion. Even though the cross-motions had been fully briefed before the interrogatory answer was filed in the other litigation on June 20, 1980, Philko would presumably have had ample opportunity to deliver the document to this Court

(Footnote continued on following page)

that he still "owned" the old aircraft was stated as a conclusion in the context of "hold[ing] the title papers in my possession until the transaction with the new airplane would be completed and when he delivered to me the title on the new airplane, I would deliver to him the paperwork or title on the old airplane." Those *title papers* to the old aircraft were retained instead of a bank escrow by way of *security*, to protect himself pending completion of the purchase transaction. Philko again betrays its erroneous one-to-one identification of *title* transfers with *ownership*—ignoring, as it does on the principal claim in this lawsuit, the common commercial practice of using title retention for *security* purposes. But in all events the payment of *value* by Shackets cannot be disputed.

Shackets' Status as Good Faith Buyers

Nothing in Philko's motion derogates from the Court's discussion of the issue of Shackets' good faith (see Opinion 13-15). Philko persists in missing the whole point that whatever question existed as to *Smith's* right to the aircraft was a question vis-a-vis *Clark Aircraft*. And on that score the Court need do nothing more than repeat the statement at Opinion 15:

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[2] *continued*

and opposing counsel well before the Opinion was rendered September 22, 1980. Under the circumstances it is at best doubtful whether the material satisfies the "newly discovered evidence" standard of Rule 60(b)(2) or the "excusable neglect" test of Rule 60(b)(1). Nonetheless the Court has considered the interrogatory answer for purposes of this ruling. In that respect, the Court observes parenthetically that in speaking of that answer, Philko says that "as of June 20, 1980 Maurice Shacket averred under oath that he is still the owner of the old aircraft." In fact, Shacket's answer to interrogatories was signed and notarized in December, 1979, though filed in a Minnesota state court in 1980. Philko's carelessness with the facts and with its statement of the holdings in the Opinion discussed later is not such as to inspire confidence in Philko's arguments generally.

> As for Shacket's awareness of Smith Aircraft's financial problems, Shacket had no obligation to monitor Smith Aircraft's financial arrangements with Clark (a matter between those two parties), and Shacket's failure to do so does not bear on the issue of his good faith. Instead, Rittenhouse's response to Shacket at the closing that it was all right to proceed—after Rittenhouse had specifically asked to be present—conclusively rejects any lack of good faith, which the parties agree is the material fact on this issue (citing *Tumber v. Automation Design & Mfg. Co.*, 130 N.J. Super. 5. 324 A.2d 602 (1974)).

Philko also blurs the issue by misstating the Opinion's characterization of the agency question. It is fundamental law that agency cannot be created by the purported agent's self-use of that term. As the Court stated at Opinion 13, the mark of an agency relationship here would be that "if Smith Aircraft were acting as an agent and not as a principal for its own account, the purchase transaction with Clark, *including the price of the aircraft as negotiated by Smith*, would have had to be for the direct benefit of Shacket."[3] What Philko still does not want to understand is that if an *agent* makes a deal for his principal, the price that the agent commits for is the price the *principal* pays. That was plainly not so here, where Smith Aircraft was plainly dealing for its own account in the purchase from Clark Aircraft.

Non-Material Errors in the Opinion

In assembling its statement of facts from the materials submitted by the parties in support of their cross-motions for summary judgment, the Court apparently erred as to the date of the original Smith-McArdle contact regarding the aircraft. As Philko has pointed out, that appears to have occurred after rather than before the Shacket-Smith closing. Accordingly the

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[3] In referring to the Court's opinion in that respect, Philko deliberately omitted the underlined clause, which is the decisive indicium of agency lacking in this case.

first full paragraph at Opinion 5 should be revised to read:

> Before the events described in the prior section, McArdle had been pressuring Smith to repay the remaining balance of $60,000 on Philko's $80,000 loan made to Smith Aircraft in December 1977. On April 21, 1978, two days after the closing with Shacket, Smith came to McArdle and represented that he had contracted to purchase a plane (which was in fact the same plane that had been paid for by and delivered to Shacket) for resale to a third party, Krueger Aviation. Smith claimed to have tried to borrow $152,000 from Bank on the plane but to have been refused because that would have exceeded his line of credit with Bank.

At the top of Opinion 6, the reference to April 22, 1978 as two days after the Shacket transaction should be changed to *three* days.

Neither of those inadvertent errors is in any respect relevant to the substantive discussion in the Opinion. They have no bearing on the legal issues, as to which the relative timing of the two Smith transactions is wholly immaterial.

Philko's Status as a "Purchaser" or "Buyer"

Philko distorts both the Opinion and the record on this issue. It is plain that McArdle's understanding was that the funds from resale of the aircraft would *not* inure to Philko's benefit but to Smith Aircraft's. As Opinion 18 stated:

> Thus it is plain from his own testimony McArdle had no interest in the sale price to be paid by Krueger Aviation, except to make sure it was adequate to pay the bank loan and the $60,000 balance owed to Philko. That is the conclusive hallmark of a *credit* transaction not a *purchase.*

There is only one respect in which the Court finds it necessary to clarify its Opinion in the "purchaser" section. At various points in the discussion the Court used the terms "purchaser" and "buyer" interchangeably, not

as terms of art but in the common parlance in which they are synonyms. Under the UCC, however, the critical and more precise terminology—and the terminology the Court should have used throughout—relates to the parties' status or lack of status as *buyers* not *purchasers.*

As Opinion 19 stated, under UCC §1-202(9) "buying" specifically does not include a transfer as security. Accordingly, for the reasons stated in the Opinion Shacket *was* and Philko *was not* a "buyer"—and hence a "buyer in the ordinary course of business." Thus the case presents a conflict between a buyer in the ordinary course of business (Shacket) who failed to record a transaction, and the holder of a subsequently recorded security interest (Philko). All the Court's references at Opinion 19-20 to "bona fide purchaser" should be read as "buyer in the ordinary course of business"—and so read, all of the authorities therein cited support the Court's reasoning and conclusion in the Opinion. They confirm the superiority of the interest of a "buyer" to that of a secured party (see UCC §9-307).

As for Philko's other arguments, they offer nothing other than matters that were urged upon and rejected by the Court in the parties' original briefing. They require no discussion other than that already contained in the Opinion.

Conclusion

Except for the minor and non-dispositive respects in which this memorandum opinion and order has modified the Opinion, Philko's motion is denied. Counsel for plaintiffs are again directed to submit a form of final judgment for entry by the Court on or before January 27, 1981.

/s/ Milton I. Shadur
United States District Judge

Date: January 19, 1981

APPENDIX E

FORM APPROVED OMB NO. 04-R0016

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION
FEDERAL AVIATION ADMINISTRATION

DO NOT WRITE IN THIS BLOCK FOR FAA USE ONLY

0 0 0 0 0 0 6 4 2

AIRCRAFT BILL OF SALE

C I 7 2 5 4 6

FOR AND IN CONSIDERATION OF $ THE UNDERSIGNED OWNER(S) OF THE FULL LEGAL AND BENEFICIAL TITLE OF THE AIRCRAFT DESCRIBED AS FOLLOWS:

AIRCRAFT MAKE AND MODEL
Piper PA-31

MANUFACTURER'S SERIAL NUMBER
31-7812074

NATIONALITY & REGISTRATION MARKS
N78MS

DOES THIS 24th DAY OF April 1978 HEREBY SELL, GRANT, TRANSFER AND DELIVER ALL RIGHTS, TITLE, AND INTERESTS IN AND TO SUCH AIRCRAFT UNTO:

JUN 13 7 40 AM '78
FEDERAL AVIATION ADMINISTRATION
CONVEYANCE

PURCHASER

NAME AND ADDRESS
(IF INDIVIDUAL(S), GIVE LAST NAME, FIRST NAME, AND MIDDLE INITIAL)

Philko Aviation, Inc.
c/o Aurora Municipal Airport
Sugar Grove, Illinois 60554

AND TO EXECUTORS, ADMINISTRATORS, AND ASSIGNS TO HAVE AND TO HOLD SINGULARLY THE SAID AIRCRAFT FOREVER, AND WARRANTS THE TITLE THEREOF

IN TESTIMONY WHEREOF I HAVE SET my HAND AND SEAL THIS 24th DAY OF 4 1978

SELLER

NAME (S) OF SELLER (TYPED OR PRINTED)	SIGNATURE (S) (IN BLACK INK.) (IF EXECUTED FOR CO-OWNERSHIP, ALL MUST SIGN.)	TITLE (TYPED OR PRINTED)

#-2 - 3 - 1

ACKNOWLEDGMENT (NOT REQUIRED FOR PURPOSES OF FAA RECORDING - HOWEVER, MAY BE REQUIRED BY LEGAL LAW FOR VALIDITY OF THE INSTRUMENT.)

ORIGINAL - TO FAA

$5.00

FORM APPROVED
OMB NO. 04-R0293

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION — FEDERAL AVIATION ADMINISTRATION

AIRCRAFT BILL OF SALE

8 0 0 0 0 0 6 4 1

FEDERAL AVIATION ADMINISTRATION
JUN 12 / 00 AM '78

CONVEYANCE

C 172547

FOR AND IN CONSIDERATION OF $ 1.00 THE UNDERSIGNED OWNER(S) OF THE FULL LEGAL AND BENEFICIAL TITLE OF THE AIRCRAFT DESCRIBED AS FOLLOWS:

UNITED STATES REGISTRATION NUMBER: N 78MS

AIRCRAFT MANUFACTURER & MODEL: Piper PA-31

AIRCRAFT SERIAL No.: 31-7812074

DOES THIS 20th DAY OF April 19 78 HEREBY SELL, GRANT, TRANSFER AND DELIVER ALL RIGHTS, TITLE, AND INTEREST IN AND TO SUCH AIRCRAFT UNTO:

Do Not Write In This Block FOR FAA USE ONLY

PURCHASER

NAME AND ADDRESS
(IF INDIVIDUAL(S), GIVE LAST NAME, FIRST NAME, AND MIDDLE INITIAL.)

Roger Smith Aircraft Sales, Inc.
Aurora Municipal Airport
Sugar Grove, Ill 60554

DEALER CERTIFICATE NUMBER

AND TO their EXECUTORS, ADMINISTRATORS, AND ASSIGNS TO HAVE AND TO HOLD SINGULARLY THE SAID AIRCRAFT FOREVER, AND WARRANTS THE TITLE THEREOF.

IN TESTIMONY WHEREOF I HAVE SET our HAND AND SEAL THIS 20th DAY OF Apr 19 78

SELLER	NAME (S) OF SELLER (TYPED OR PRINTED)	SIGNATURE (S) (IN INK) (IF EXECUTED FOR CO-OWNERSHIP, ALL MUST SIGN.)	TITLE (TYPED OR PRINTED)
	Clark Aviation, Inc	Kenneth Kitchen	President

ACKNOWLEDGMENT (NOT REQUIRED FOR PURPOSES OF FAA RECORDING; HOWEVER, MAY BE REQUIRED BY LOCAL LAW FOR VALIDITY OF THIS INSTRUMENT.)

ORIGINAL: TO FAA

AC FORM 8050-2 (5-72) (8052-035-0002)

FORM APPROVED
OMB NO. 04-R0019

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION

AIRCRAFT BILL OF SALE

0 0 0 0 0 0 6 1 7 2 5 4 4

JUN 13 7 40 AM '78
CONVEYANCE
CLERK
DEPT. OF TRANSPORTATION

FOR AND IN CONSIDERATION OF $1.00&OVC&K, UNDERSIGNED OWNER(S) OF THE FULL LEGAL AND BENEFICIAL TITLE OF THE AIRCRAFT DESCRIBED AS FOLLOWS:

UNITED STATES REGISTRATION NUMBER N 78MS

AIRCRAFT MANUFACTURER & MODEL Piper PA-31-325

AIRCRAFT SERIAL No. 31-7812074

DOES THIS 18th DAY OF April 19 78 HEREBY SELL, GRANT, TRANSFER AND DELIVER ALL RIGHTS, TITLE, AND INTERESTS IN AND TO SUCH AIRCRAFT UNTO:

Do Not Write In This Block
FOR FAA USE ONLY

PURCHASER

NAME AND ADDRESS
(IF INDIVIDUAL(S), GIVE LAST NAME, FIRST NAME, AND MIDDLE INITIAL.)

CLARK AVIATION, INC.
Bloomington-Normal Airport
Bloomington, Illinois 61701

DEALER CERTIFICATE NUMBER

AND TO their EXECUTORS, ADMINISTRATORS, AND ASSIGNS TO HAVE AND TO HOLD SINGULARLY THE SAID AIRCRAFT FOREVER, AND WARRANTS THE TITLE THEREOF.

IN TESTIMONY WHEREOF WE HAVE SET OUR HAND AND SEAL THIS 18 DAY OF April 19 78

SELLER

NAME (S) OF SELLER (TYPED OR PRINTED)	SIGNATURE (S) (IN INK) (IF EXECUTED FOR CO-OWNERSHIP, ALL MUST SIGN.)	TITLE (TYPED OR PRINTED)
NORTH STATES AVIATION, INC.	Bill J. Tausend	Manager

ACKNOWLEDGMENT (NOT REQUIRED BY FAA FOR CITIZENS OF U.S., BUT MAY BE REQUIRED BY LOCAL LAW FOR VALIDITY OF THIS INSTRUMENT.)

ORIGINAL: TO FAA

FORM APPROVED
OMB NO. 04-R0025

UNITED STATES OF AMERICA
DEPARTMENT OF TRANSPORTATION

AIRCRAFT BILL OF SALE

0 0 0 0 0 2 1 6 1 7 2 5 4 3

FOR AND IN CONSIDERATION OF $1.00 &ovr; THE UNDERSIGNED OWNER(S) OF THE FULL LEGAL AND BENEFICIAL TITLE OF THE AIRCRAFT DESCRIBED AS FOLLOWS:

1 UNITED STATES REGISTRATION NUMBER N N78MS

AIRCRAFT MANUFACTURER & MODEL Piper PA-31

AIRCRAFT SERIAL No. 31-7812074

DOES THIS 18th DAY OF April 19 78 HEREBY SELL, GRANT, TRANSFER AND DELIVER ALL RIGHTS, TITLE, AND INTERESTS IN AND TO SUCH AIRCRAFT UNTO:

JUN 13 / 40 PM '78
FEDERAL AVIATION ADMINISTRATION
CONVEYANCE SECTION

Do Not Write In This Block
FOR FAA USE ONLY

PURCHASER

NAME AND ADDRESS
(IF INDIVIDUAL(S), GIVE LAST NAME, FIRST NAME, AND MIDDLE INITIAL.)

NORTH STATES AVIATION, INC.
4521 Patterson S.E.
Grand Rapids, MI 49508

DEALER CERTIFICATE NUMBER

AND TO their EXECUTORS, ADMINISTRATORS, AND ASSIGNS TO HAVE AND TO HOLD SINGULARLY THE SAID AIRCRAFT FOREVER, AND WARRANTS THE TITLE THEREOF.

IN TESTIMONY WHEREOF WE HAVE SET OUR HAND AND SEAL, THIS 18 DAY OF April 78

SELLER

NAME (S) OF SELLER (TYPED OR PRINTED)	SIGNATURE (S) (IN INK) (IF A CORPORATION, FOR CO-OWNERSHIP, ALL MUST SIGN.)	TITLE (TYPED OR PRINTED)
Piper Aircraft Corporation	[signature]	Manager of Sales

ACKNOWLEDGMENT (IF REQUIRED BY LOCAL LAW FOR RECORDING IN THE JURISDICTION.)

My Commission Expires March 14, 1980

ORIGINAL: TO FAA

AC FORM 8050-2 (1-72) (SUPERSEDES)

[signature]

APPENDIX F

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI

Article VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

49 U.S.C. Sec. 1403 (1981)

§ 1403. Recordation of aircraft ownership

(a) Establishment of recording system. The Administrator [Secretary of Transportation] shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;

(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff shaft horsepower, and also any assignment or amendment thereof or supplement thereto;

(3) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 604(b) of this Act [49 USCS § 1424(b)] for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof; and also any assignment or amendment thereof or supplement thereto;

(b) Recording of releases, cancellations, discharges, or satisfactions. The Administrator [Secretary of Transportation] shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

(c) Validity of conveyances or other instruments, filing. No conveyance or instrument the recording of which is provided for by section 503(a) [subsec. (a) of this section] shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator [Secretary of Transportation]: Provided, That previous recording of any conveyance or instrument with the Administrator of the Civil Aeronautics Administration under the provisions of the Civil Aeronautics Act of 1938 shall have the same force and effect as though recorded as provided herein; and conveyances, the recording of which is provided for by section 503(a)(1) [subsec. (a)(1) of this section] made on or before August 21, 1938, and instruments, the recording of which is provided for by sections 503(a)(2) and 503(a)(3) [subsecs. (a)(2) and (a)(3) of this

section] made on or before June 19, 1948, shall not be subject to the provisions of this subsection.

(d) Effect of recording. Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, except that an instrument recorded pursuant to section 503(a)(3) [subsec. (a)(3) of this section] shall be effective only with respect to those of such items which may from time to time be situated at the designated location or locations and only while so situated: Provided, That an instrument recorded under section 503(a)(2) [subsec. (a)(2) of this section] shall not be affected as to the engine or engines, or propeller or propellers, specifically identified therein, by any instrument theretofore or thereafter recorded pursuant to section 503(a)(3) [subsec. (a)(3) of this section].

(e) Form of conveyances or other instruments. Except as the Administrator [Secretary of Transportation] may by regulation prescribe, no conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

(f) Index of conveyances and other instruments. The Administrator [Secretary of Transportation] shall keep a record of the time and date of the filing of conveyances and other instruments with him and of the time and date of recordation thereof. He shall record conveyances and other instruments filed with him in the order of their reception, in files to be kept for that purpose, and indexed according to—

(1) the identifying description of the aircraft, aircraft engine, or propeller, or in the case of an instrument referred to in section 503(a)(3) [subsec. (a)(3) of this section], the location or locations specified therein; and

(2) the names of the parties to the conveyance or other instrument.

(g) Regulations. The Administrator [Secretary of Transportation] is authorized to provide by regulation for the endorsement upon certificates of registration, or aircraft certificates, of information with respect to the ownership of the aircraft for which each certificate is issued, the recording of discharges and satisfactions of recorded instruments, and other transactions affecting title to or interest in aircraft, aircraft engines, propellers, appliances, or parts, and for such other records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties dealing with Civil aircraft of the United States, aircraft engines, propellers, appliances, or parts.

(h) Previously unrecorded ownership of aircraft. The person applying for the issuance or renewal of an airworthiness certificate for an aircraft with respect to which there has been no recordation of ownership as provided in this section shall present with his application such information with respect to the ownership of the aircraft as the Administrator [Secretary of Transportation] shall deem necessary to show the persons who are holders of property interests in such aircraft and the nature and extent of such interests.

49 U.S.C. Sec. 1406 (1981)

§ 1406. Law governing validity of certain instruments

The validity of any instrument the recording of which is provided for by section 503 of this Act [49 USCS § 1403] shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

Ill. Rev. Stat. Ch. 26, Sec. 2-403 (1978)

§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7). 1961, July 31, Laws 1961, p. 2101, § 2-403.

Supreme Court, U.S.
FILED
JAN 24 1983
ALEXANDER L. STEVAS
CLERK

No. 82-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,

Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

JOINT APPENDIX

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PETITION FOR CERTIORARI FILED AUGUST 20, 1982
CERTIORARI GRANTED DECEMBER 6, 1982

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In The

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October Term, 1982

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JOINT APPENDIX

JUDGMENT IN QUESTION

The following opinions, decisions, judgments and orders have been omitted in printing this appendix because they appear on the following pages in the appendix to the printed Petition for Certiorari:

Declaratory Judgment Order of the United States District Court for the Northern District of Illinois dated February 6, 1981—Pet. App. B (pp. 14a-16a).

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois dated September 22, 1980—Pet. App. C (pp. 17a-34a).

Memorandum Opinion and Order of the United States District Court for the Northern District of Illinois dated January 19, 1981—Pet. App. D (pp. 35a-40a).

Opinion of the United States Court of Appeals for the Seventh Circuit dated January 22, 1982—Pet. App. A (pp. 1a-13a).

CHRONOLOGICAL LIST OF REVELANT DOCKET ENTRIES

Relevant Docket Entries In The United States District Court For The Northern District Of Illinois

Date	*Docket Entry*

October 31, 1978—Complaint of Maurice and Sylvia Shacket.

November 27, 1978—Answer and Counterclaim of Philko Aviation, Inc.

December 19, 1978—Amended Complaint of Maurice and Sylvia Shacket.

January 17, 1979—Answer and Counterclaim of Sandwich State Bank.

April 5, 1979—Answers of Maurice and Sylvia Shacket to Defendant Philko Aviation's First Set of Interrogatories.

April 26, 1979—Order entered April 25, 1979 adjudging Roger Smith and Roger Smith Aircraft Sales in default for failure to answer or otherwise plead.

April 30, 1979—Answers of Sandwich State Bank to Plaintiffs' First Set of Interrogatories.

May 24, 1979—Answers of Philko Aviation to Plaintiffs' First Set of Interrogatories.

December 29, 1979—Plaintiff-Counterdefendant's Motion for Summary Judgment.

March 26, 1980—Defendant Philko Aviation's Response to Motion for Summary Judgment and Crossmotion for Summary Judgment against Plaintiffs; and Defendant Edward J. McArdle's Motion for Summary Judgment on Count II of Plaintiffs' Complaint.

Date	*Docket Entry*

September 23, 1980—Memorandum Opinion and Order entered September 22, 1980 (a) granting summary judgment in favor of Plaintiffs Maurice and Sylvia Shacket on Count I of the Amended Complaint and entering summary judgment in favor of Plaintiffs on the Counterclaim of Philko Aviation, Inc. and The Sandwich State Bank; (b) Denying Philko's Crossmotion for Summary Judgment; and (c) granting Edward J. McArdle's Motion for Summary Judgment on Count II of Plaintiffs' Complaint.

October 3, 1980—Judgment Order entered October 2, 1980 in accordance with Memorandum Opinion and Order of September 22, 1980.

December 9, 1980—Plaintiffs' Motion for Summary Judgment against Roger Smith and Roger Smith Aircraft Sales, Inc.

December 11, 1980—Defendant Philko Aviation Inc.'s Motion to Modify Judgment Order pursuant to Section 60(b).

December 18, 1980—Default Judgment Order entered in favor of Plaintiffs and against Roger Smith and Roger Smith Aircraft Sales, Inc.

January 16, 1981—Order entered January 16, 1981 extending time for filing Notice of Appeal 20 days beyond date fixed.

January 20, 1981—Memorandum Opinion and Order entered January 19, 1981 denying Defendant Philko Aviation's Motion to Modify Judgment Order in all principal effects, making limited modifications.

February 6, 1981—Final Declaratory Judgment Order entered January 30, 1981.

February 17, 1981—Defendant Philko Aviation's Notice of Appeal to the Seventh Circuit Court of Appeals.

Relevant Docket Entries In The United States Court Of Appeals For The Seventh Circuit

Date	*Docket Entry*

March 16, 1981—Order granting Motion to include depositions and Philko's Section 60(b) Motion as part of Record on Appeal.

June 22, 1981—Judgment Order and Opinion.

July 26, 1981—Amended Motion for Stay of Mandate.

August 25, 1981—Order Granting Motion for Stay of Mandate.

September 7, 1981—Notice of Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

EXCERPT FROM DEPOSITION

DEPOSITION OF RICHARD M. ANDREWS,
VICE PRESIDENT, SANDWICH STATE BANK

Direct Examination

* * *

By Mr. Dore: [Attorney for Philko Aviation, Inc.]

[78][1] * * * Q. You referred to a term "chain of title".

A. Yes.

Q. Mr. Andrews, based on your experience from [79] 1974 through the current date, what do you understand to be the chain of title?

A. Chain of title, in my mind, would be the proper bills of sale originating from the record owner of the aircraft to and including the ultimate purchaser. And along with those bills of sale, any release of lien which may be required as indicated on any title search.

Q. There are, as I understand your testimony, separate methods of your undertaking. One is where an aircraft is titled already, is that correct?

A. Correct.

Q. Explain to me what your procedures would be where the aircraft is titled currently.

A. Okay. If the airplane is titled currently as reflected by a title search, the title search would indicate not only the make, model, and serial number of the aircraft, but also the present record owner of the aircraft and any liens of record.

Also on a title search, it would indicate the previous owner of the aircraft—do you want this information, John?

Q. Yes, I do.

A. Everything? Okay. The type of ownership that [80] the airplane is currently registered in such as individual co-owner, partnership or corporation.

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[1] Numbers in brackets signify the page of the deposition transcript where the material appearing below the number can be located.

Q. Okay. Where do you get this information from?

A. From a title search firm in Oklahoma City.

Q. Is it your procedure each time you would—in the bank against the purchase of an aircraft lien by a customer, is it your procedure that a title search would be made?

A. That's correct.

Q. Is it your procedure that the title search would be made prior to the issuance of any loan proceeds?

A. Very definitely.

Q. Okay. The title search that is conducted by an agency, from what records—from what organizations do they obtain the information for the title search?

MR. COOK: If you know.

THE WITNESS: They get the information from the files of the Federal Aviation Administration.

By Mr. Dore:

Q. Is there any other place to obtain the information that you would get on a title report?

A. The FAA is the only source of this information, [81] to my knowledge.

Q. Would it be fair to say that the FAA has a central registry for aircraft in the United States?

MR. MURRAY: Objection.

MR. DORE: You can answer.

THE WITNESS: I would say yes.

By Mr. Dore:

Q. How do you know that?

A. Through my knowledge of aircraft financing and aircraft recordation as well as briefs of court cases which I have read.

Q. The recordation, the knowledge by reading court cases, was this present—did you have this knowledge at the time the moneys were advanced for the purchase of aircraft 78 MS?

A. This is correct.

Q. Now, as I understand your statement, aircraft 78 MS when purchased by Philko Aviation was not a titled aircraft?

A. That is correct. The title search on 78 MS indicates aircraft was in an unregistered status.

Q. Was some information or some data on the record with the Federal Aviation Administration that the manufacturer was Piper Aviation, is that correct?

[82] A. Piper Manufacturing.

Q. What else was indicated on those records?

A. That a copy of a bill of sale to North States Aviation had been submitted but not recorded.

Q. Why was that?

A. Why was it submitted?

Q. Why was it not recorded?

MR. MURRAY: Objection.

THE WITNESS: I believe it was a copy for information purposes only.

By Mr. Dore:

Q. I see. Did you obtain this information prior to the time that Sandwich State Bank issued the check for $152,000?

A. Yes.

Q. Okay. Using this information, did you use that data or that information received from the Federal Aviation Administration records as a basis for making this loan?

A. That's correct.

Q. What additional items did you obtain from Roger Smith in order for Sandwich State Bank to make this loan?

A. I received from Roger Smith a bill of sale, [83] an original. I want to stress the term "original" here. This is important to me as a lender, that it's an original bill of sale because the FAA will not accept documents which are not signed in ink. They will not accept copies.

I received an original bill of sale from Piper Manufacturing to North States Aviation; a bill of sale from North States Aviation to Clark Aviation; a bill of sale from Clark Aviation to Roger Smith Aircraft Sales, Inc.; and a bill of sale from Roger Smith Aircraft Sales, Inc. to Philko Aviation, Inc.

Q. Who asked you or directed you to make the check payable to Clark Aviation?

A. Roger Smith.

Q. Did he explain to you why it was necessary to have a check for a $152,000 made payable to Clark Aviation?

A. Roger indicated that he was acting as a broker in completing the transaction to Philko Aviation, Inc.; and that in order to complete payment of the aircraft, it had to be made payable to Clark Aviation, Inc.

Q. So that there was an obligation or an amount still owed Clark Aviation, is that what you are saying?

[84] MR. MURRAY: Objection, objection.

THE WITNESS: That's what he indicated to me.

By Mr. Dore:

Q. When Roger Smith appeared at the Sandwich State Bank, I believe on April 21—or was it April 22? Would you tell me which?

A. I don't know if Roger Smith appeared.

Q. All right. Who did you get the bills of sale from?

A. Either Roger Smith or an agent or runner for Roger Smith.

Q. Okay. Go ahead.

A. I received the bills of sale completing, what I thought to be, the chain or [sic] title of the airplane as well as the loan documentation of Philko Aviation, Inc., at the same time. And this was on April 22, 1978.

Q. The loan documentation you are referring to, that was the securing of the loan from Sandwich State Bank by Philko Aviation, is that correct?

A. That is correct.

Q. For the loan of $152,000?

A. That is correct.

Q. And this loan documentation was executed by Mr. McArdle, is that correct?

[85] A. That's correct, as president of Philko Aviation.

Q. Would you have issued the loan for $152,000 without that document, Mr. Anderson?

MR. COOK: Andrews.

MR. DORE: I'm sorry, Mr. Andrews.

THE WITNESS: No, I would not.

By Mr. Dore:

Q. Mr. Andrews, in your experience, is it an unusual practice to have Sandwich State Bank issue moneys against title documents for aircraft?

MR. COOK: Excuse me a second. Can you—

MR. MURRAY: Have her read the witness back the question again.

(The question was read.)

MR. COOK: Can you clarify that as to before or after their file for recording.

MR. MURRAY: Do you understand the question?

MR. COOK: I'm concerned about the time frame that he's talking about.

THE WITNESS: Let me see if I understand. Do you mean, if I have in my hand title documents, would I issue loan proceeds?

[86] By Mr. Dore:

Q. That's correct.

A. Yes, I would.

Q. That's right. And you have done this in the past?

A. Yes.

Q. All right. Do you do that currently?

A. Yes.

Q. You had done this prior to the time of the issuance of the check for $152,000, this practice?

A. Yes, yes.

Q. Was it the practice of Sandwich State Bank to go out and physically look at the aircraft prior to the time that the loan would be issued?

A. No.

* * * * *

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FILED
NOV 12 1982
ALEXANDER L. STEVAS,
CLERK

No. 82-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

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Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

A. Whether recordation of a conveyance with the Federal Aviation Administration, which conveyance was void under state law, vests any title to an aircraft.

B. Whether petitioner can present issues never raised in the lower court as a basis for granting its petition for writ of certiorari.

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RESPONDENTS' BRIEF IN OPPOSITION

The respondents, Maurice Shacket and Sylvia Shacket, respectfully urge that this Court deny the Petition For Writ of Certiorari to review the Judgment and the Opinion of the United States Court of Appeals for the Seventh Circuit entered in this proceeding on June 22, 1982 and reported in 681 F.2d 506 (7th Cir. 1982).

STATEMENT OF THE CASE

The Statement Of The Case presented by Philko Aviation, Inc. ("Philko") represents little more than a total distortion of the facts found by both the District Court

and the Court of Appeals in their respective decisions in this action. The following represents a chronology of undisputed facts which Philko Aviation has simply failed to advise this Court of. Respondents believe these facts are necessary to enable this Court to render a decision on Philko's Petition For Writ Of Certiorari to the United States Court of Appeals.

Background

Roger Smith Aircraft Sales, Inc. ("Smith Aircraft") was, for many years, engaged in the business of buying and selling aircraft, as well as chartering aircraft. Smith Aircraft was located and operated at the DuPage County Airport. In 1977, Roger Smith, President of Smith Aircraft, desired to move his operations to another location and became interested in purchasing a company called Philko Aviation, Inc. ("Philko"), located at the Aurora Municipal Airport. Philko sold oil and gas, operated a flight school, performed aircraft maintenance and repairs, and sold aircraft. Smith could not afford to purchase Philko, so he sought a financial backer to assist in the acquisition. That financial backer was Edward J. McArdle. McArdle eventually purchased Philko and turned Philko's day-to-day business operations over to Roger Smith and Smith Aircraft under a so-called "lease arrangement". Under that arrangement, Smith Aircraft continued existing operations of Philko and Philko's name, accounting to Philko for all expenses and receipts. Smith Aircraft was permitted to use Philko's buildings for the operation of Smith Aircraft's aircraft sales and charter businesses. Smith Aircraft also bought and sold aircraft for Philko. McArdle's relationship with the President of Smith Aircraft did not end with the lease arrangement between the two companies. McArdle lent his personal credit, as well as the credit of other McArdle companies, to assist Smith Aircraft by

guaranteeing obligations of Smith Aircraft and making loans to Smith Aircraft. Eventually McArdle attempted to purchase Smith Aircraft from Smith.

The Transaction Between Philko And Smith Aircraft

On April 22, 1978, just two days after Smith turned over possession of the aircraft to the Shackets at closing, Smith approached McArdle, stating he needed $152,000 to pay the balance of the purchase price to Clark Aviation for the same aircraft he had sold and delivered to the Shackets. Smith told McArdle the aircraft was then to be sold by Smith to Krueger Aviation, a California corporation. Smith told McArdle that, upon consummation of the sale to Krueger Aviation, Smith would be able to pay off a $60,000 loan from Philko to Smith Aircraft as well as the $152,000 loan being obtained from the bank. McArdle was shown the original bills of sale as well as the bills of sale to Philko from Smith Aircraft for the aircraft. By his own testimony, McArdle, President of Philko, stated that his activities with Smith were merely to facilitate Smith Aircraft's transaction with Krueger Aviation. McArdle had no interest in the sale price to be paid by Krueger for the same aircraft which Smith was purportedly selling Philko, except to make certain that it was adequate to pay the bank loan of $152,000 and the $60,000 loan owed to Philko. Whatever profit that was realized in the Krueger transaction would inure solely to the benefit of Smith Aircraft. The entire transaction between Smith Aircraft and Philko Aviation took place during one meeting on April 22, 1978. At no time did either the bank or Philko question Smith regarding his possession of bills of sale without having fully paid Clark Aviation for the aircraft nor did the bank or Philko attempt to verify Smith Aircraft's claim that the aircraft was being fitted with certain equipment.

REASONS FOR DENYING THE WRIT

1.

UNDER FEDERAL LAW, THE MERE RECORDATION BY PHILKO AVIATION OF A CONVEYANCE VOID UNDER STATE LAW DOES NOT DIVEST THE SHACKETS OF TITLE TO THEIR AIRCRAFT.

Contrary to Philko's repeated suggestions, this case does not present a conflict between state and federal law concerning title disputes to aircraft. The federal law in the area of recordation of title merely demonstrates Congress' intent to establish a central filing system for the registering of documents of title and security documents for aircraft and is not intended to decide title disputes to aircraft. Rather, under federal law, Congress has wisely designated that state law should control title disputes between claimants. In *Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086, 1088 (3d Cir. 1978), the court noted:

> [T]here has been preemption by federal law only to the limited extent that Congress has sensibly federalized choice of law, thereby freeing aircraft financing from forum shopping which the rule of *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487, 61 S. Ct. 1020, 85 L. Ed. 1477 (1941), might otherwise produce.

Under Title 49 U.S.C. §1401(f), the registration of any document of title shall not be evidence of ownership of an aircraft in any proceeding in which such ownership by a particular person is, or may be, an issue. Despite this statutory language, which appeared to leave title questions to state law, some courts had held that the federal recordation statute for aircraft preempted state law on the transfer of title. *Marsden v. Southern Flight Service, Inc.*, 227 F. Supp. 411 (M.D.N.C. 1961); *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E.2d 610 (1949). To

clarify Congressional intent not to preempt state law in determining the underlying validity of any conveyance or instrument relating to an aircraft, Congress amended the statute by adding Section 506 of the Federal Aviation Act, 49 U.S.C. §1406, which provides as follows:

> *The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia,* or territory or possession of the United States in which such instrument is delivered, irrespective of the location of the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified. (Emphasis added)

The Senate report addressing the intent of this statute states:

> The bill would create a uniform federal rule which would provide that the validity of certain instruments affecting title or interest in aircraft shall be governed by the laws of the State, District of Columbia, or territory or possession in which they are delivered. Designation of the place of delivery in the instrument would constitute presumptive evidence that the instrument was delivered at the place so specified.
>
> Analysis and Need for Legislation.
>
> It establishes a uniform federal rule governing the validity of the instruments affecting title to or interests in aircraft and related equipment. The rule would apply to all instruments subject to the recording provisions of Section 503 of the Federal Aviation Act. Included would be various instruments executed for security purposes such as conveyances, leases, mortgages, equipment trusts, conditional sales contracts, etc. Assignments and amendments and supplements to such instruments would

> similarly be covered. *To determine the validity of such an instrument, one would need only look to the substantive law of the particular state in which the relevant instrument was delivered.* See *U.S. Code Congressional and Administrative News* 1964, Vol. 2, Pages 2319 to 2320. (Emphasis added)

Clearly, Congress did not intend to preempt state law as to the validity of a conveyance evidenced by instruments which are recordable under Section 1403. Philko has, however, conveniently chosen to ignore this point throughout this litigation. Although Philko relies heavily upon its recording a bill of sale with the FAA, which purported to convey the Shacket aircraft from Smith to Philko this fact is of no consequence for the conveyance was invalid under state law.

The bill of sale between Smith Aircraft and Philko recites that Smith Aircraft was conveying all its right, title and interest to a certain aircraft. However, at the time of the execution of that bill of sale, Smith Aircraft had no interest in the aircraft. Under state law, title had already passed to the Shackets upon the physical delivery of the aircraft. *See Humphrey Cadillac and Oldsmobile Co. v. Sinard*, 85 Ill. App. 2d 64, 229 N.E.2d 365 (1st Dist. 1967); *Texas National Bank v. Aufderheide*, 235 F. Supp. 599, 603 (E.D. Ark. 1964). Moreover, Philko had no intent to take title to this aircraft but, rather, the transaction between Philko and Smith Aircraft was merely a credit transaction. Although the bill of sale between Smith Aircraft and Philko recites Philko as the purchaser, it is clear from the facts of this case that Philko was never intended to be a purchaser. McArdle, the President of Philko, acknowledged that the entire economic benefit of the Krueger Aviation purchase (not just the $60,000 which was used to pay off Smith Aircraft's debt to Philko) was going to go to Smith Aircraft, not Philko. McArdle clearly stated that

all the funds from the sale after payment of the $152,000 bank loan and the $60,000 debt would be for the sole benefit of Smith Aircraft.

As the foregoing demonstrates, Philko was not, under state law, a buyer of the Shackets' aircraft since Philko was merely extending credit to Smith Aircraft. Philko was not a buyer in the ordinary course of business, since "buying" under U.C.C. §1-201(9) specifically excludes transfers "as security for or in total or partial satisfaction of a money debt." Since buying does not include a security transfer, Philko simply cannot be a buyer in the ordinary course of business. Nor could Philko acquire title as a good faith purchaser for value since Philko failed to take possession of the aircraft. Under U.C.C. §2-403(1) one cannot be a good faith purchaser for value absent possession of the property. Manifestly, the purported conveyance between Smith Aircraft and Philko was totally invalid under state law.

Unable to dispute the logic of the foregoing, Philko attempts to save the validity of the purported conveyance by claiming that, notwithstanding the dictate of state law, the mere recording of the bill of sale between Smith Aircraft and Philko provides it with title to an aircraft. This argument is fatally flawed. Since Congress has determined that state law will control questions of title to aircraft, the federal recordation of an instrument will not make a transaction in an aircraft valid if that transaction, as determined by state law, conveys no interest in the aircraft. *CIM International v. United States*, 641 F.2d 671, 675 at fn. 6 (9th Cir. 1980). Furthermore, the implication by Philko that an instrument must be recorded in order to look to substantive state law is unsupported by the plain language contained in §1406, as well as its accompanying legislative history. Indeed, Philko's novel proposition is di-

rectly contradicted by numerous courts which have held that state law is to be applied in determining the inherent validity for any conveyance or encumbrance related to an aircraft. *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App. 3d 1, 401 N.E.2d 1340 (5th Dist. 1980); *Bank of Hendersonville v. Red Baron Flying Club*, 571 S.W.2d 152 (Tenn. App. 1977), *cert. denied* (Tenn. 1978), *cert. denied*, 439 U.S. 1089 (1979); *Northern Illinois Corp. v. Bishop Dist. Co.*, 284 F. Supp. 121 (W.D. Mich. 1968); *United States Aviation Underwriters, Inc. v. WTAE Flying Club*, 300 F. Supp. 341 (W.D. Pa. 1969); *Suburban Trust & Savings Bank v. Campbell*, 19 Ohio Misc. 74, 250 N.E.2d 118 (1969); *Southern Jersey Airways, Inc. v. National Bank of Secaucus*, 108 N.J. Super. 369, 261 A.2d 399 (1970); *Carolina Aircraft Corp. v. Commerce Trust Co.*, 289 So. 2d 37 (Fla. App. 1974); *Industrial National Bank v. Butler Aviation International, Inc.*, 370 F. Supp. 1012 (E.D.N.Y. 1974); *Idabel National Bank v. Tucker*, 544 P.2d 1287 (Okla. App. 1975), *cert. denied* (Okla. 1975); *Catlin Aviation Co. v. Equilease Corp.*, 626 P.2d 857, (Okla. 1981). *In re Holiday Airlines Corp.*, 620 F.2d 731 (9th Cir. 1980) *cert. denied*, 449 U.S. 900 (1980).

Philko Aviation, however, argues that the application of Section 506 of Federal Aviation Act (Title 49 U.S.C. 1406) is limited to disputes relating to recorded instruments. The cases cited by Philko Aviation do not support that contention but, rather, sustain the principle that Congress has directed the courts to look to state law to determine competing interests in aircraft. In *CIM International v. United States*, 641 F.2d 671 (9th Cir. 1980), the government argued that Section 506 of Federal Aviation Act applied only to instruments which were on file with the FAA. In rejecting that contention, the Court stated:

* * *

> The government asserts that section 1406 relates only to determination of the validity of interests which are in fact on file with the FAA. That view rests on the government's basic, and erroneous, premise that no unfiled interests can ever be invalid and would leave no law applicable to unfiled interests. Such a limited view of section 1406 is compelled by neither its language nor its legislative history.
>
> We need not discuss at length the parties' contentions on whether section 1403 "preempts" state law, in whole or in part, respecting the interests in aircraft. This court has held that, though Section 1403 may govern priority, matters touching validity of interests in aircraft under section 1403 are determinable in reference to state law.

Id. at 675 n. 6.[1]

Similarly, in *Haynes v. General Elect. Credit Corp.*, 432 F. Supp. 763 (W.D. Vir. 1977), *aff'd* 582 F.2d 869 (4th Cir. 1978), relied upon by Philko, the court stated: "Questions such as the validity of title documents, good faith purchasers status and the like, must be resolved under state law." Philko conveniently omitted to cite to this language in the *Haynes* opinion but, rather, chose to distort the language of the district court's opinion. In summary, it is clear even from the cases cited by Philko to this Court in support of its Petition, that the validity of the transaction between Philko and Smith Aircraft, as evidenced by the recorded bill of sale, must be determined by state law.

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[1] It is interesting to note that the author of the CIM opinion, Chief Judge Markey, Chief Judge, United States Court of Customs and Patent Appeals, was also the author of the opinion in this case for the United States Court of Appeals for the Seventh Circuit.

In a last ditch effort to avoid the clear weight of judicial authority which invalidates the conveyance between Philko and Smith Aircraft, Philko claims that, if this case had been filed in California, Oklahoma, Florida, or North Carolina, an opposite result would have occurred. That is simply not true. The validity of the transfer from Smith Aircraft to Philko would be determined the same in those states as the decision rendered in the Court of Appeals below.

For example, in *Catlin Aviation Co. v. Equilease Corp.*, 626 P.2d 857 (Okla. 1981), the Oklahoma Supreme Court stated that if an instrument is void under state law, federal recordation would not save it. Thus, even under Oklahoma law, because the transfer between Philko and Smith Aircraft is void under state law, the fact that Philko recorded it with the FAA would not transfer title of the Shackets' aircraft to Philko. Similarly, in *O'Neill v. Barnett Bank of Jacksonville*, 360 So. 2d 150 (Fla. App. 1978), the buyer knew that the aircraft being sold by the seller was for rental purposes and he knew that it was not part of the seller's sales inventory. The court held that the buyer was not a buyer in the ordinary course of business and the court recognized that the substantive validity of any instrument affecting an aircraft was to be determined by the laws of the state in which the instrument is delivered. Clearly, the result in *O'Neill* compels the conclusion that Florida courts would have to determine the validity of the transfer of the aircraft between Philko Aviation and Smith Aircraft by reference to Florida state law.

Finally, in *Dowell v. Beech Acceptance Corporation*, 91 Cal. Rptr. 1, 476 P.2d 401 (1971), *cert. denied*, 404 U.S. 823 (1971) the Court held that a properly registered security interest was enforceable against a buyer in the ordinary course who subsequently purchased an aircraft. Although the decision represents a distinct minor-

ity view on that issue, the California court was not faced with issues questioning the validity of the security interest at the time it was recorded with the FAA. That decision is inappropriate to the matters at issue here. *Dowell* simply does not address the issue of whether the recordation of an instrument void under state law conveys any right in an aircraft. Had *Dowell* been confronted with the precise issue, it is submitted that it would follow the clear weight of authority and apply state law to determine the validity of an instrument recorded with the FAA.[2]

As demonstrated herein, the decision of the Court of Appeals for the Seventh Circuit properly applied federal law by applying state law to the transaction between Philko Aviation and Smith Aircraft. No conflict between state and federal law exists in this matter, nor is preemption at issue.

2.

THIS COURT SHOULD NOT GRANT A WRIT OF CERTIORARI ON QUESTIONS THAT WERE NEVER PRESENTED TO THE LOWER COURT.

For the first time in this litigation, Philko Aviation suggests that a private right of action should exist for the failure by the Shackets to record the conveyance of the aircraft from Smith Aircraft to the Shackets.[3] Phil-

[2] The only decision cited to this Court relating to North Carolina law is *Marsden v. Southern Flight Service, Inc.*, 227 F. Supp. 411 (M.D.N.C. 1961). That case predated the adoption of Section 506 of Federal Aviation Act and is, therefore inapplicable.

[3] It is, indeed, disingenuous for Philko to suggest that it should have a cause of action against the Shackets for their alleged failure to record their conveyance with the FAA. The transaction between Philko and Smith Aircraft occurred in only one meeting. That transaction, as demonstrated by the

(Footnote continued on following page)

ko further contends that Shackets should be estopped from claiming title to the aircraft by failing to obtain the original bills of sale. None of these issues were presented to the lower court for decision. This Court ordinarily does not decide questions not raised or resolved in the lower court. *State v. Taylor*, 353 U.S. 553, 556, n. 2, 77 S. Ct. 1037, 1 L. Ed. 2d 1034 (1957); *Lawn v. United States*, 355 U.S. 339, 363, n. 16, 78 S. Ct. 311, 324, 2 L. Ed. 2d 321 (1958). Since Philko never presented either of these issues before the District Court or the Court of Appeals, it is submitted that it cannot present such issues to the Supreme Court for the first time as grounds for this Court to grant its Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit.

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[3] *continued*

facts of this case, was merely a credit transaction in an attempt by McArdle to secure repayment of a $60,000 loan from Smith Aircraft, which had serious financial problems. In light of the fact that Philko Aviation never checked with or made any attempt to check with the FAA as far as the recordation of title, its newly discovered "claim" that it reasonably relied on the state of the title with the FAA is sheer sophistry.

Nor did Philko Aviation, through its President, McArdle, make any effort to verify the story that Smith Aircraft had its equity already invested in the plane. McArdle was advised that Smith Aircraft lacked possession of the plane at the time the transaction occurred. As the District Court noted, had McArdle made a single inquiry of Clark Aviation, seller of the aircraft to Smith Aircraft, the Shackets' rights would have been disclosed. That Philko closed its eyes, through lack of its own diligence, to what otherwise would have been obvious, is hardly a basis for predicating liability upon the Shackets.

CONCLUSION

Based upon the foregoing, respondents, Maurice Shacket and Sylvia Shacket, request that this Court deny the Petition For Writ Of Certiorari to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED

Ch. 20 Nationality And Ownership 49 § 1401

SUBCHAPTER V—NATIONALITY AND OWNERSHIP OF AIRCRAFT

§ 1401. Registration of aircraft nationality

Effect of registration

(f) Such certificate shall be conclusive evidence of nationality for international purposes, but not in any proceeding under the laws of the United States. Registration shall not be evidence of ownership of aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue.

Pub.L. 85-726, Title V, § 501, Aug. 23, 1958, 72 Stat. 771.

Ch. 20 Nationality And Ownership 49 § 1406

§ 1406. Law governing validity of certain instruments

The validity of any instrument the recording of which is provided for by section 1403 of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

Pub.L. 85-726, Title V, § 506, as added Pub.L. 88-346, § 1(a), June 30, 1964, 78 Stat. 236.

26 § 1-201. Commercial Code

(9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the goods buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. "Buying" may be for cash or by exchange of other property or on secured or unsecured credit and includes receiving goods or documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

Supreme Court, U.S.
FILED
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No. 82-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,

Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

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CERTIORARI GRANTED DECEMBER 6, 1982

QUESTIONS PRESENTED

By enacting Section 1403 of the Federal Aviation Act, 49 U.S.C. Section 1403 (1981), requiring the recordation of conveyances affecting aircraft, did Congress preempt state law insofar as state law would permit the conveyance of title to aircraft by transfer of possession alone, without FAA recording?

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[1] Philko Aviation, Inc., the Petitioner herein, is a wholly owned subsidiary of McArdle, Ltd., a Delaware Corporation. Philko Aviation, Inc. has no subsidiaries. McArdle, Ltd. has the following wholly owned subsidiaries in addition to Philko Aviation, Inc.: Airport Farms, Inc.; American Lodging Corp.; Big Flamingo II, Inc.; Bonhomme Richard, Ltd.; Burr Hill Country Club Inc.; Burr Hill Properties, Ltd.; Forty-Six East Oak, Ltd; Pheasant Run, Inc.; Rockton Productions, Inc.; Smith Road Properties, Inc.; Spanish Lakes, Inc. and Wilson World Travel, Inc.

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No. 82-342

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. A, 1a-13a) is reported at 681 F.2d 506 (7th Cir. 1982). The order and opinion of the District Court (Pet. App. B, C and D, 14a-40a) is reported at 497 F. Supp. 1262 (N.D. Ill. 1980).

JURISDICTION

The judgment of the Court of Appeals (Pet. App. A, 1a-13a) was entered on June 22, 1982. The Petition for Certiorari was filed on August 20, 1982 and was granted on December 6, 1982. The jurisdiction of this Court rests upon 28 U.S.C. Sec. 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

United States Constitution, Article VI;
49 U.S.C. Sec. 1401 (1981);
49 U.S.C. Sec. 1403 (1981);
49 U.S.C. Sec. 1406 (1981);
Ill. Rev. Stat. Ch. 26, Sec. 2-401 (1978);
Ill. Rev. Stat. Ch. 26, Sec. 2-403 (1978).

The full text of these constitutional and statutory provisions are included in the Appendix to this Brief.

STATEMENT OF THE CASE

Background of the Philko Transaction

The Petitioner Philko Aviation, Inc. (Philko) owns the fixed base hangar and office facilities at the Aurora Municipal Airport, in Aurora, Illinois. (R. AA Dep. 31-34)[1] Philko's president is Edward J. McArdle. (McArdle) (R. EM Dep. 4) Philko is a subsidiary of McArdle, Ltd., a corporation engaged primarily in the recreational and leisure time business. One of its principal subsidiaries is Pheasant Run, Inc. in St. Charles, Illinois. McArdle, Ltd. utilizes aircraft in conducting its business. (R. AA Dep. 9-23)

In early 1977, McArdle met Roger Smith (Smith) while inspecting aircraft to replace an existing business aircraft. At that time, Smith operated Roger Smith Aircraft

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[1] Petitioner in its brief shall refer to the following depositions all of which have been filed as part of the record in this case in the manner indicated below:

Deposition of Anastasios Agnos taken July 18, 1979	R. AA Dep.
Continued deposition of Anastasios Agnos taken October 23, 1979	R. AA-2 Dep.
Deposition of Richard Andrews taken October 4, 1979	R. RA Dep.
Deposition of Jack Hamburg taken July 12, 1979	R. JH Dep.
Deposition of Edward J. McArdle taken October 30, 1979	R. EM Dep.
Deposition of Maurice Shacket taken July 12, 1979	R. MS Dep.
Continued deposition of Maurice Shacket taken July 13, 1979	R. MS-2 Dep.
Deposition of Sylvia Shacket taken July 12, 1979	R. SS Dep.

Sales Inc. (Smith, Inc.), an aircraft dealership located at the Du Page County Airport, Du Page County, Illinois. Smith told McArdle in the spring of 1977 that the Aurora Municipal Airport facility in Aurora, Illinois was for sale. Because Smith himself could not afford to buy the Aurora facility, he wanted to find someone who would purchase the facility and lease it back to him. (R. EM Dep. 12-21) McArdle decided to buy the Aurora facility which was near Pheasant Run in order to provide a convenient location to store McArdle, Ltd.'s corporate aircraft and to be an economical source for fuel and oil for these aircraft. (R. EM Dep. 17, 23-24) Philko Aviation, Inc. was incorporated in 1977 to acquire the Aurora facility. In acquiring the Aurora facility, Philko was required to buy the seller's inventory of aircraft, approximately ten airplanes. Philko then leased the facility to Smith, Inc. (R. EM Dep. 24) Under the lease, Smith, Inc. was to sell aviation fuel and lubricants, operate a flight school, and liquidate Philko's existing aircraft. These activities were to be done in Philko's name. (R. AA Dep. 53-56; R. EM Dep. 39) Smith, Inc. was also allowed to and did conduct a used aircraft dealership in its own name at the Aurora airport. (R. AA Dep. Ex. 7-7a)

After Philko and Smith, Inc. entered into their lease, Smith persuaded McArdle to guaranty a portion of a secured line of credit for Smith, Inc. Philko guaranteed $100,000 of Smith, Inc.'s $500,000 secured line of credit at Commercial Credit Equipment Corporation. (R. EM Dep. 27) Philko did this to help insure that Smith, Inc. was profitable and could make its lease payments. Philko was not separately compensated by Smith, Inc. for giving this guaranty. (R. EM Dep. 28-29)

In December of 1977, Pheasant Run, Inc., one of McArdle, Ltd.'s subsidiaries, loaned Smith, Inc. $80,000 at 9%

interest due June 19, 1978 so Smith, Inc. could discharge an existing bank loan which had come due. This loan to Smith, Inc. was secured by the personal, collateralized guaranties of Mr. and Mrs. Smith. Between December, 1977 and April, 1978 Smith, Inc. reduced the principal balance of this loan to $60,000. (R. AA Dep. 91)

Background of the Shackets' Transaction

Maurice and Sylvia Shacket are the owners and officers of Crown Heating and Manufacturing, a Michigan corporation. They are also owners or part owners of Troy Mobile Homes and have ownership interests in and manage other trailer home parks. (R. MS Dep. 6-8; SS Dep. 7-8) Shacket has been a pilot for some 35 years, holding multiple licenses issued by the Federal Aviation Administration. (R. MS Dep. 6-8)

From approximately 1959 through 1975 Shacket had purchased and traded six aircraft. Shacket knew that the FAA maintained at Oklahoma City, Oklahoma a central registry for registering titles to aircraft. (R. MS-2 Dep. 26-27) Each time Shacket had purchased an aircraft he received notification from the FAA that the bill of sale had been recorded and title to the aircraft had been duly registered with the FAA facility at Oklahoma City, Oklahoma. (R. MS Dep. 6-19; MS-2 Dep. 26-27) In 1972 or 1973 Shacket purchased a Piper Aztec from Smith, Inc. After this purchase he personally applied to the FAA to change the registration number on the Piper Aztec. In 1975 Shacket traded his 1972 Piper Aztec for a 1972 Piper Navajo owned by a Florida resident. This transaction occurred in Charlotte, North Carolina. To complete this transaction Shacket personally prepared the bill of sale and registration forms issued by the FAA to effect the transfer of title to his aircraft. (R. MS Dep. 19-22)

The Dual Transactions Involving The New 1978 Piper Navajo Aircraft

Sometime prior to November, 1977 Smith, Inc. sent Shacket its advertising flyer listing certain used aircraft for sale. Shacket contacted Smith, Inc. in 1977 in response to this flyer. Ultimately, Shacket decided to purchase a new 1978 Piper Navajo from Smith, Inc. Shacket and Smith, Inc. agreed on a purchase price of $126,000 plus the trade-in of Shacket's current aircraft, the 1972 Piper Navajo. A purchase order was signed for the new Piper aircraft between Shacket and Smith, Inc. providing for an anticipated delivery date of January or February, 1978. Shacket paid Smith a $20,000 deposit with the execution of the purchase order on November 7, 1977. (R. MS Dep. 33-40, 45-46) This aircraft was to be delivered through Clark Aviation, a franchised Piper dealer. (R. MS Dep. 53-54)

In March of 1978, Shacket allowed Smith, Inc. to take his 1972 Navajo and received a loaner aircraft pending delivery of the new 1978 Piper Navajo. However, Shacket did not turn over to Smith, Inc. a bill of sale for the trade-in aircraft. Shacket suggested that the bill of sale for his trade-in airplane be placed in escrow with a bank. Roger Smith did not want to establish an escrow. It was then expressly agreed between Smith and Shacket that Shacket would hold the bills of sale for the trade-in airplane until the transaction with the new airplane was completed. When Smith delivered to Shacket the title on the new 1978 Piper Navajo, Shacket would then deliver to Roger Smith the bill of sale on the 1972 Navajo. Shacket did this in order to retain ownership of his trade-in airplane until the deal for the new Piper aircraft was completed. (R. 52, 53 [M. Shackett Affidavit, Exhibit A to Philko's Section 60(b) Motion]) Shacket never delivered the bill of sale for the 1972 Piper Navajo to Smith, Inc.

(R. MS-2 Dep. 17-23) He still retained the bill of sale on the trade-in aircraft more than two years after Smith received the trade-in aircraft. (R. 52, 53 [M. Shacket Affidavit, Exhibit A to Philko's Section 60(b) Motion])

Mr. and Mrs. Shacket flew in from Detroit, Michigan to Aurora on April 19, 1978 accompanied by their friends, Mr. and Mrs. Jack Hamburg. Upon arrival at Smith, Inc.'s office at the Aurora Municipal Airport, Shacket called Ken Rittenhouse, President of Clark Aviation, to advise him that they were closing. Rittenhouse came to Smith, Inc.'s office that same day. Roger Smith, Maurice Shacket, Kenneth Rittenhouse and Jack Hamburg then met in Smith, Inc.'s office. (R. MS-2 Dep. 36-41) Shacket asked Mr. Rittenhouse if everything was satisfactory with him and Rittenhouse said to go ahead. Rittenhouse gave Shacket *xerox copies* of the original bills of sale from Piper Aircraft Corporation to North States Aviation, from North States to Clark Aviation, and from Clark Aviation to Smith, Inc. Roger Smith gave Shacket a *purchaser's copy* of a bill of sale from Smith, Inc. to Shacket. Shacket did not ask for or receive any original bills of sale recordable with the FAA. (R. MS-2 Dep. 53-56) Shacket failed to examine the documents he received at the time he paid his money to Smith, Inc. (R. MS-2 Dep. 56-57) The first time he examined the papers he received was in mid-June of 1978. (R. MS-2 Dep. 57)

During this meeting on April 19, 1978, Roger Smith told Shacket that he was unable to complete the preparation of the bills of sale because of the demands of other work. Afterwards Shacket asked his friend, Jack Hamburg, who was returning to Detroit by a separate plane, to get the paperwork from Smith and bring it back to Detroit. Roger Smith then advised Jack Hamburg that his secretaries were too busy and couldn't finish typing

the documents. Roger Smith told Jack Hamburg that he would mail the documents to Shacket. (R. JH Dep. 44-49)

Roger Smith did not make any direct representation to Shacket that Smith would record the bills of sale with the FAA. Shacket, however, understood Roger Smith's representation that "he would take care of the paperwork" to mean that Smith would record the bills of sale. (R. MS-2 Dep. 75-76)

On or about April 20, 1978 Roger Smith represented to McArdle that Smith, Inc. had purchased a new Piper Navajo which was to be sold to a buyer in California named Krueger Aviation. Smith presented McArdle a series of original aircraft "Bills of Sale—Original to FAA," conveying title for this new aircraft from Piper Aircraft Corporation, the manufacturer, to North States Aviation Inc. (a Piper Aviation Corporation distributor for new aircraft); from North States Aviation, Inc. to Clark Aviation, Inc. (a franchised dealer for Piper aircraft); and from Clark Aviation, Inc. to Smith, Inc. plus a copy of a "Purchase Order" for the new airplane allegedly signed by Krueger Aviation. At that time Smith told McArdle that the New Piper Navajo was currently at a Piper dealer in Michigan having electronic equipment installed. (R. EM Dep. 65-66, 69; Pet. App. E 41a-44a)

Roger Smith offered to sell Philko the new aircraft in satisfaction of the remaining $60,000 obligation Smith, Inc. owed Philko and payment by Philko of an additional $152,000 cash. McArdle agreed to purchase the aircraft if a loan could be arranged from the Sandwich State Bank. McArdle arranged for Philko to borrow $152,000 from the Sandwich State Bank (Bank), in order to purchase the plane. As part of these arrangements Richard Andrews, loan officer and vice president of the Bank, was to make the loan only after he determined that

the title documentation was proper and that everything was in good order to record title to the new aircraft in Philko. (R. EM Dep. 61-64; RA Dep. 39-40)

Following its usual procedure prior to making the loan, the Bank, through Andrews, had a title search made on April 21, 1978 for the new Piper Navajo. (R. RA Dep. 109-110) The information received from this search at the Federal Aviation Administration (FAA) facility in Oklahoma City, Oklahoma was that the new 1978 Piper Navajo aircraft was as yet unregistered. The FAA records showed only that Piper Aircraft Corporation had manufactured this aircraft and that record notification had been submitted by Piper Aircraft Corporation, showing a proposed transfer to North States Aviation, Inc., a Piper distributor. (App. 7-8)

On April 22, 1978 McArdle signed the Bank's loan documents and the documents for registration of the new Piper aircraft in the name of Philko. (R. EM Dep. 64) These documents and the original bills of sale were presented to Andrews by Roger Smith. (R. EM Dep 72) It was the practice of the Bank to make aircraft loans only against the original signed documents of title because the FAA recording facility would not accept copies for filing of record. Andrews found the original signed documents and the FAA title check in order and disbursed the loan proceeds of $152,000 on April 22, 1978. (App. 9-10) That same day Andrews confirmed the transaction with McArdle by telephone. (R. EM Dep. 72) Although not expressly instructed by Philko to do so, Andrews retained the original bills of sale for approximately 30 days before commencing the recording process. Andrews did this because he expected that Philko might resell the aircraft and the FAA's usual time lapse in returning the recorded instruments might have delayed a subsequent sale. (R. RA Dep. 114, 129)

On May 25, 1978 Andrews sent the original bills of sale and Philko's application for registration to Insured Aircraft Title Service Inc. in Oklahoma City, Oklahoma with directions to file them with the FAA. (R. RA Dep. 130-135) On or about May 31, 1978 these original instruments were filed with the FAA. (Pet. App. E 41a) On June 13, 1978 the FAA recorded the bills of sale showing Philko as registered owner of the 1978 Piper Navajo N 78 MS and reflecting the security interest of the Bank for its $152,000 loan to Philko. (Pet. App. E 41a-44a)

Prior to mailing the original bills of sale, neither McArdle, Philko, nor Richard Andrews of the Sandwich State Bank, had any direct or indirect knowledge of either the existence of Maurice Shacket or any of the dealings or transactions he had with Roger Smith or Smith, Inc. It was not until after June 13, 1978 when the bills of sale had been recorded with the FAA that McArdle and Andrews were telephoned by Shacket and advised of the transaction between Shacket and Smith, Inc. (R. EM Dep. 76-78; MS-2 Dep. 98-99)

The proceeding below was a declaratory judgment action brought pursuant to 29 U.S.C. Sec. 2255 (1981) to determine title to the 1978 Piper Navajo, registered by the Federal Aviation Administration as aircraft number N 78 MS in the name of Petitioner Philko Aviation, Inc. This aircraft is and has been during the pendency of these proceedings in the possession of Respondents Maurice and Sylvia Shacket, although the aircraft has never been registered in their names. The United States District Court for the Northern District of Illinois entered summary judgment in favor of Respondents (a) finding title in the Shackets, (b) declaring that Philko had no title to the aircraft, and (c) denying Philko's claim for damages. The Court of Appeals for the Seventh Circuit affirmed the District Court's decision on June 22, 1982.

SUMMARY OF ARGUMENT

I.

Federal law and state law irreconcilably conflict concerning titles to and liens upon aircraft. Federal law requires filing with the FAA to achieve a valid interest in aircraft as against third parties without notice. Section 2-401 of the Uniform Commercial Code permits the physical transfer of possession alone to effect transfer of title in aircraft. Congress enacted a recording requirement to reflect all interests in aircraft which would promote investment in the aircraft industry. State law is preempted insofar as it interferes with this objective.

II.

The legislative history of the Federal Aviation Act reveals a clear attempt by Congress to promote the development of the aircraft industry. From 1938 to 1964, Congress amended the Federal Aviation Act and its predecessor, the Civil Aeronautics Act, by broadening the scope of the recording provisions of Section 503. In 1964, Congress added Section 506, 49 U.S.C. Sec. 1403 (1981) to provide a consistent rule for choice of law to determine the substantive validity of recorded instruments. This choice of law provision was not intended to modify in any way the recording provisions of Section 503. In enacting Section 506, Congress expressly recognized that titles to and liens upon aircraft are normally conveyed by documents alone, irrespective of the location of the aircraft.

III.

The scheme of regulation chosen by Congress shows the intent to establish a race-notice recording statute with respect to financial interests in aircraft. First, Congress legislated that no conveyance or interest in aircraft can be valid as against third parties without notice unless and until filed with the FAA. Secondly, Congress mandated the indexing of all filed instruments according to the order in which they are received for filing. These are the essential earmarks of a race-notice type of recording statute. Section 506 is intended to work in harmony with Section 503 by providing a rule for choice of law as to the substantive validity of recorded instruments. Any rule of law which permits Section 506 to effectively destroy the credibility of valid instruments of conveyance or other valid instruments recorded in accordance with Section 503 frustrates the Congressional intent of the Federal Aviation Act.

IV.

By viewing Section 503 as essentially a race-notice recording statute, most if not all of the recurring disputes concerning financial interests in aircraft can be consistently and predictably resolved in a manner which promotes Congressional intent. In analyzing various assumed fact situations, according priority in right to the first to record encourages the reliance upon and use of the FAA central registry. The judicial interpretation of Section 506 should be confined to the determination of the validity of an instrument and should not be expanded in its scope to include substantive law the effect of which is to annul recorded security interests without notice or allow transfer of title by possession. Interpreted in this fashion, the provisions of Sections 503 and 506 are entirely practicable in the fact situations in which the majority of disputes arise.

ARGUMENT

I.

THERE EXISTS AN IRRECONCILABLE CONFLICT BETWEEN THE RECORDING PROVISIONS OF THE FEDERAL AVIATION ACT AND STATE SALES LAW.

In determining whether and to what extent the recording provisions of the Federal Aviation Act preempt state law, the initial inquiry is whether there exists an irreconcilable conflict between state and federal law. *Rice, Director of Department of Alcoholic Beverage Control of California v. Norman Williams Co., et al.*, ... U.S. ....., 102 S. Ct. 3294 (1982). The instant case presents just such a conflict. Section 503(c), 49 U.S.C. Sec. 1403(c) (1981) provides that a conveyance shall not be valid with respect to third parties without notice unless and until it is filed for recordation with the Federal Aviation Administration (FAA). Section 2-401 of the Uniform Commercial Code, Ill. Rev. Stat. Ch. 26, Sec. 2-401 (1978) provides that title to goods may pass in any manner agreed upon by the parties, but unless otherwise agreed, title passes when the seller completes his performance with respect to physical delivery of the goods, even though a document of title is to be delivered at a different time or place. Under Section 503(c), Smith, Inc.'s conveyance of the new Piper Navajo aircraft to Philko is valid because Philko obtained the original bills of sale, verified the status of title and duly recorded with the FAA Central Registry. (Pet. App. E 41a-44a) Philko, however, never received physical possession of the new Pipe Navajo aircraft because Smith had represented to McArdle that the plane was in Michigan at a Piper dealer for the installation of electronic equipment. Under Section 503(c) Smith, Inc.'s purported conveyance of the new

Piper Navajo aircraft to the Shackets can have no validity as to third parties without notice because the Shackets failed to obtain instruments of conveyance and failed to record. Nevertheless under state law, Section 2-401, Shacket could have a valid conveyance upon the receipt of physical possession of the aircraft. The record conclusively shows that Philko, however, had no notice of the Shackets' purported transaction until after it paid for the plane and filed the bills of sale with the FAA.

Even though Congress has not completely displaced state regulation in a particular field, state law is preempted insofar as it stands as an obstacle to the achievement of the objectives and purposes of Congress in that field. *Fidelity Federal Savings & Loan Assn. v. De La Cuesta*, ... U.S. ....., 102 S. Ct. 3014 (1982); *Hines v. Davidowitz*, 312 U.S. 52, 67 (1941). The purpose of Congress as discerned by the Court is the ultimate touchstone. *Malone v. White Motor Corp.*, 435 U.S. 497, 504 (1978). In Title V of the Federal Aviation Act, Congress has unequivocally legislated two requirements with respect to aircraft conveyances: (a) the necessity to record each and all conveyances; and (b) the place of recording. One of Congress' primary purposes was to provide stability in the realm of aircraft titles. Stability in this area encourages the investment of capital because those who purchase, finance purchases or otherwise invest in aircraft can be certain of the legal status of their interest. Maintaining the flow of capital to the air transportation industry promotes the modernization and maintenance of aircraft. The intent of Congress in enacting Title V of the Federal Aviation Act is evident from the legislative history and from the scheme of regulation contained in this section of the Act.

II.

THE LEGISLATIVE HISTORY OF SECTIONS 503 AND 506 DEMONSTRATES THAT CONGRESS INTENDED TO EFFECTUATE THE STATUTORY SYSTEM FOR MANDATORY RECORDING OF INSTRUMENTS AFFECTING AIRCRAFT TITLES BY NULLIFYING UNRECORDED CONVEYANCES AS AGAINST PARTIES WHO, WITHOUT NOTICE, RELY UPON THE FAA CENTRAL REGISTRY.

Prior to the enactment of the Civil Aeronautics Act of 1938 (hereinafter CAA), the air transportation industry was regulated by no less than three separate agencies of the federal government. In addition, certain executive departments of government were also involved in the development of airways and air navigation facilities. Congress deemed it vital for the development of the aeronautics industry to implement a single cohesive body of regulation administered by a single agency of government. H.R. Rep. No. 2254, 75th Cong., 3d Sess. 1-5 (1938). In addition to establishing a single regulatory agency of the federal government, the 1938 Act had three broad objectives: (a) to foster the development of civil aeronautics; (b) to regulate the economic aspects of public air carriers in order to prevent destructive competition and wasteful duplication of resources; and (c) to insure minimum safety standards with respect to all air transportation, public and private. Congress had previously enacted the Air Commerce Act of 1926, 44 Stat. 572 (1926), which established a policy of regulating the design, manufacture and operation of aircraft flying in interstate commerce, prescribing qualifications for airmen and promulgating air traffic rules. The 1938 Act was intended to continue this safety regulation and entrust it to the newly formed agency. H.R. Rep. No. 2254, 75th Cong., 3d Sess. 4 (1938).

The Air Commerce Act of 1926, 44 Stat. 572 (1926), predecessor to the CAA, contained no regulatory pro-

visions with respect to aircraft title interests. The Air Commerce Act only contained a permissive registration section, which provided:

> (a) Registration of aircraft.—Provide for the granting of registration to aircraft eligible for registration, if the owner requests such registration. No aircraft shall be eligible for registration (1) unless it is a civil aircraft owned by a citizen of the United States and not registered under the laws of any foreign country, or (2) unless it is a public aircraft of the Federal Government, or of a State, Territory, or possession, or of a political subdivision thereof. All aircraft registered under this subdivision shall be known as aircraft of the United States.

Air Commerce Act of 1926, Sec. 173, 44 Stat. 572. The CAA implemented the first regulation of aircraft with respect to nationality and ownership. In 1938, therefore, Congress made a conscious determination that the Air Commerce Act was insufficient to meet the needs of the aircraft industry. With respect to nationality and ownership of aircraft the CAA mandated registration of aircraft and recordation of conveyances affecting aircraft. Specifically with respect to recordation of conveyances affecting title to aircraft, the Civil Aeronautics Act of 1938, 52 Stat. 973, provided:

> Establishment of Recording System
>
> SEC. 503. (a) The Authority shall establish and maintain a system for recording all conveyances affecting the title to, or interest in, any civil aircraft of the United States.
>
> Conveyances To Be Recorded
>
> (b) No conveyance made or given on or after the effective date of this section, which affects the title to, or interest in, any civil aircraft of the United States, or any portion thereof, shall be valid in respect of such aircraft or portion thereof against

> any person other than the person by whom the conveyance is made or given, his heir or devisee, and any person having actual notice thereof, until such conveyance is recorded in the office of the secretary of the Authority. Every such conveyance so recorded in the office of the secretary of the Authority shall be valid as to all persons without further recordation. Any instrument, recordation of which is required by the provisions of this section, shall take effect from the date of its recordation, and not from the date of its execution.

Although the Senate or House Committee Reports pertaining to the 1938 Act do not expressly state why Congress felt it necessary to enact mandatory registration and recording provisions, it is reasonable to infer that the registration and recording requirement had as its purpose to aid the Civil Aeronautics Authority in carrying out at least two of the three statutory objectives: fostering civil aeronautics and effectuating the safety standards imposed by the Act. Certainty of the legal status of aircraft titles creates an environment where capital may be safely invested, thereby promoting the growth of the industry. Recordation of all ownership interests in aircraft enables the agency to monitor aircraft safety standards on a continuing basis, and provides a means to notify aircraft owners of airworthiness requirements pertaining to their respective aircraft.

In 1948 Congress amended Section 503 of the Civil Aeronautics Act of 1938. The amendment provided a system for the recordation of liens on large aircraft engines and on spare parts used by air carriers. This amendment was intended to facilitate financing of new aircraft. Purchasers of new aircraft, especially commercial aircraft, normally buy spare engines and spare parts. Because the 1938 Act did not provide for recording liens on engines or spare parts alone, these items were ex-

tremely difficult to finance. As a result, this retarded the purchase of new, more efficient aircraft by air carriers. S. Rep. No. 1362, 80th Cong., 2d Sess. 1-2 (1948).

Section 503 was rewritten in this 1948 Amendment. Section 503(b) of the 1938 Act which contained the mandatory recording provision became 503(c). Section 503(c), as revised in 1948, 62 Stat. 494 (1948) provided:

> (c) No conveyance the recording of which is provided for by section 503(a) (1) made on or after August 22, 1938, and no instrument the recording of which is provided for by section 503(a) (2) or section 503(a) (3) made on or after the effective date of this section, shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator. For the purposes of this subsection (c), such conveyance or other instrument shall take effect from the time and date of its filing for recordation, and not from the time and date of its execution.

Under Section 503(b) of the 1938 Act, CAA instruments affecting aircraft titles took effect as to third parties without notice on the date of recording, not the date of filing or execution. Under the 1948 revision, as to third parties without notice, conveyances were effective upon the date of filing for recordation. This amendment demonstrates the continued legislative intent to maintain a current and reliable central registry of all financial interests in civil aircraft. The nullification of unrecorded conveyances as against unsuspecting parties who rely upon the central registry in dealing with the purchase or financing of civil aircraft or aircraft parts creates a

stable commercial environment for the investment of capital in the air transportation industry.

With respect to Section 503(c) the Senate Committee on Interstate and Foreign Commerce stated:

> Subsection 503(c) provides that a conveyance or instrument which could be recorded as provided in section 503(a) shall be invalid with respect to third persons without notice unless recorded as provided in the bill. This extends the rule now in effect with respect to conveyances affecting title to, or interest in, aircraft to the instruments recordable under the new legislation. The last sentence provides that for the purpose of giving notice to third persons, the instrument shall be effective from the date of its filing for recordation. This leaves the instrument valid for all other purposes from the date of its execution.

S. Rep. No. 1362, 80th Cong., 2d Sess. 3 (1948).

Another amendment to the CAA passed in 1948 further reveals the legislative intent to create a stable commercial and financial environment to encourage the continuing flow of investment capital into this industry. In 1948, Congress added Section 504 which prevents pure lenders from becoming liable for damages caused by airplane crashes. Section 504 provided:

> SEC. 504. No person having a security interest in, or security title to, any civil aircraft under a contract of conditional sale, equipment trust, chattel or corporate mortgage, or other instrument of similar nature, and no lessor of any such aircraft under a bona fide lease of thirty days or more, shall be liable by reason of such interest or title, or by reason of his interest as lessor or owner of the aircraft so leased, for any injury to or death of persons, or damage to or loss of property, on the surface of the earth (whether on land or water) caused by such aircraft, or by the ascent, descent, or flight of such aircraft or by the dropping or falling of an object therefrom, unless

such aircraft is in the actual possession or control of such person at the time of such injury, death, damage, or loss.

When Congress enacted the Federal Aviation Act of 1958, the registration and recording provisions were reenacted without change. 2 U.S. Code Cong. & Ad. News 3755 (1958); S. Rep. No. 1060, 88th Cong., 2d Sess. 2 (1964).

Congress next amended Section 503 of the FAA in 1959 to permit recordation of liens on individual propellers. This was done to facilitate modernization of commercial air fleets. Prior to this amendment, liens could be recorded on aircraft propellers only if they were in a definitely located stockpile under so-called "basket mortgages." In conjunction with this amendment, lenders who financed purchases of propellers were also accorded the protection against liability from airplane crashes contained in Section 504. This 1959 amendment expressed Congress' purpose to insure the flow of capital to the aircraft industry by providing further stability in financing with respect to modernization of aircraft. H.R. Rep. 445, 86th Cong., 1st Sess. 1 (1959). The fact that the recording provisions of Section 503 were expanded in 1959 demonstrates that Congress deemed state law with respect to the necessity and the place of recording inadequate to meet the needs of the industry.

Finally, Congress amended the registration and recording sections of the Federal Aviation Act in 1964 by adding Section 506, 49 U.S.C. Sec. 1406 (1981). The specific problem which this amendment addressed was the difficulty in determining the substantive law governing the validity of recorded instruments affecting aircraft titles and security interests. Section 506 therefore provided a federal rule for the choice of law relating to the substantive validity of instruments of conveyance. Senate Report

1060 expressly noted the importance of the federal recording system and reflects the intention that Section 506 was to operate in conjunction with the existing recording system not against it:

* * *

> The rule would apply to all instruments subject to the recording provisions of section 503 of the Federal Aviation Act. Included would be various instruments executed for security pruposes [sic] such as conveyances, leases, mortgages, equipment trusts, conditional sales contracts, etc. Assignments, amendments, and supplements to such instruments would similarly be covered. To determine the validity of such an instrument, one would need only to look to the substantive law of the particulr [sic] State in which the relevant instrument was delivered.
>
> The fact that the determination of the validity of aircraft conveyances involved extremely cumbersome and complex procedures was recognized by the Congress when it originally enacted the Civil Aeronautics Act of 1938. That act contained a provision which provided for the establishment of a central national recording system for all instruments affecting title to or interest in civil aircraft of this country. This provision was incorporated in section 503 of the Federal Aviation Act of 1958 substantially without change. *It continued the previously established recording system and provides that no conveyance or instrument affecting aircraft shall be valid until filed for recordation except as to parties to the instrument or persons with actual notice of its existence.* When the instrument has been filed for recordation under the law, all persons are deemed to have notice of its existence and its effect on title to the property covered thereby. *Consequently, to determine whether there are any encumbrances on the aircraft, it is only necessary to consult the central file.* [Emphasis added.] * * *

S. Rep. No. 1060, 88th Cong., 2d Sess. 2 (1964).

In enacting Section 506, Congress acknowledged that state law controlled on questions of the substantive validity of instruments. However, given Congress' continued recognition of the importance of the central nationwide recording system for aircraft, it is evident that Congress intended to preempt state law in two respects: (1) that an instrument, otherwise valid under state law, affecting an aircraft title, must be filed for recording in order to achieve validity as against third parties without notice; and (2) that the filing be done at the FAA Central Registry. As against third parties without notice, any state's substantive law which permits an interest in aircraft to be created without filing with the FAA, conflicts with the intent of the Congress as reflected in the legislative history of the FAA and is contrary to the express statutory language. With respect to the purchase of an aircraft, the transfer of physical possession alone is insufficient to convey valid title to the purchaser as to third parties without notice. With respect to any person creating a lien upon aircraft, local filing or possession (e.g., a possessory mechanic's lien) is insufficient to create an interest valid as to third parties without notice.

Section 506 expressly states that the validity of an instrument is to be determined by the law of the state of delivery of the *instrument, "irrespective of the location* or the place of delivery *of the property* which is the subject of such instrument." 49 U.S.C. Sec. 1406 (1981) [Emphasis added]. Congress therefore expressly recognized that conveyances of aircraft as well as financing of aircraft were normally accomplished by delivery of instruments notwithstanding the fact that the location of the aircraft is undetermined or undeterminable:

> While existing law has assisted materially in facilitating the determination as to the validity of instruments, it does not establish the substantive

validity of the instrument as proposed by this measure. Considerable doubt and confusion still exist in this field. The laws of the various States differ quite substantially with respect to the validity of various instruments. In attempting to resolve the issue as to which jurisdiction's laws should apply in determining such an instrument's validity, it is arguable that the law of one of three of the following jurisdictions is applicable: The jurisdiction in which the property is located; the jurisdiction in which the parties reside; or the jurisdiction in which the instrument was executed and delivered. As an example of the needless complexities and difficulties in making such a determination, suppose an airline desired to refinance its fleet of aircraft: each of the three rules governing jurisdiction would have to be covered. With respect to the first, for example, it would be necessary to know the exact location of every aircraft at the precise moment the refinancing instrument was executed. Pinpointing the exact location of aircraft, many of which today fly at speeds well in excess of 500 miles an hour, is extremely difficult and at times impossible. Such unnecessary and costly procedures which one must now go through to determine the validity of aircraft instruments would be remedied by this legislation. The bill selects, and the committee is convinced, most logically, the place where the instrument is delivered. Consequently, the prospective purchaser would not only be able to readily ascertain whether encumbrances are recorded against an aircraft but would in addition be in the position to assess the validity of any instruments affecting the aircraft's title by simply consulting the law of the place where the instruments were delivered.

* * *

S. Rep. No. 1060, 88th Cong., 2d Sess. 2 (1964).

Nowhere in the Congressional record is there any indication that by enacting Section 506 Congress intended

to alter in any way Section 503. Congress left intact the mandate of Section 503(a) for the establishment and maintenance of a system for recording "each and all conveyances, leases, mortgages, equipment trusts, contracts of conditional sale or other instruments executed for security purposes." Congress also left unchanged Section 503(c) which clearly precludes the creation of a valid interest in an aircraft as against third parties without notice by the physical transfer of possession alone. It therefore follows that as between two parties acting in good faith and who have no notice of one another's transaction with respect to a single aircraft, the party who received delivery of validly executed instruments of conveyance must prevail upon the filing of these instruments with the FAA's central registry. In the context of this manifest Congressional intent and statutory language, the criteria for the determination of the substantive validity of an instrument under state law does not include delivery or possession of the aircraft, notwithstanding state law to the contrary. Resort to state law for the determination of the validity of an instrument as provided by Section 506 is both reasonable and necessary in view of the lack of Federal substantive law. Thus Section 506 provides a Federal rule for the choice of law regarding substantive validity of instruments. The act and the Congressional intent clearly preclude the operation of state law except as to the determination of validity of an instrument recorded under the act. To hold otherwise would permit the conveyance of aircraft without documentation and frustrate the operation of Section 503.

III.

IN SECTION 503 CONGRESS HAS CHOSEN A RECORDING SYSTEM AS THE MEANS OF RESOLVING DISPUTES OVER CONFLICTING INTERESTS IN AIRCRAFT. ANY STATE LAW WHICH EMPLOYS A DIFFERENT SYSTEM IS SUPERSEDED.

One of the earmarks of Congressional intent is the scheme of the federal regulation itself. The scheme of federal regulation may be so pervasive or so dominant in a particular field that enforcement of state law on the same subject is precluded. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1946).

Since 1938 it has been the law that every aircraft owner must register with the FAA before flying the aircraft. 49 U.S.C., Sec. 1401 (1981). It is unlawful to fly an unregistered aircraft and the penalty for the failure to do so can be as high as $1,000 per day. 49 U.S.C., Sec. 1471 (1981). Determination of the procedures for registration of aircraft was delegated by Congress to the Administrator of the Federal Aviation Administration, now the Secretary of Transportation. Accordingly, Congress provided that the registration of aircraft is not determinative of ownership in any proceeding in which ownership by a particular person was in issue. 49 U.S.C., Sec. 1401(f) (1981). This implies that the Federal Aviation Administration is not a judicial arbiter as to who is rightful owner of an aircraft. Nevertheless, this does not mean that Congress considered recording a permissive or ineffective act. Section 503 imposes a duty on the Administrator to maintain a central index of conveyances which is a duty separate and distinct from the registration of aircraft. Section 503(f), 49 U.S.C., Sec. 1403(f) (1981), mandates that the Administrator maintain a record of the time and date of the filing of conveyances and other instruments with him and of the time and date

of recordation thereof. Instruments and conveyances must be filed in the order of their reception and indexed according to:

> (1) the identifying description of the aircraft, aircraft engine, or propeller, or in the case of an instrument referred to in section 503(a)(3) [subsec. (a)(3) of this section], the location or locations specified therein; and
>
> (2) the names of the parties to the conveyance or other instrument.

49 U.S.C., Sec. 1403(f) (1981).

Considering the provision of Section 503(c) that conveyances cannot be valid as to third parties without filing for record together with Section 503(f) requiring the Administrator to record the time of filing and to index instruments by aircraft and names of the parties, it is submitted that Congress was legislating a "race-notice" type of statute with respect to aircraft titles and encumbrances.

Recording statutes in the law of real estate are intended to protect real estate transactions from conflicting claims. They are considered to have a dual purpose: first, to protect the rights of innocent purchasers who acquire an interest in property without knowledge of prior encumbrances; and secondly, to establish a public record which would furnish potential purchasers with notice of previous conveyances and encumbrances that might affect their interests. 6A, Powell, R., *The Law of Real Property*, Sec. 904 (1981). When real estate law evolved to the point where deeds of conveyance were used, title transfers and encumbrances were effectuated by delivery and recording of instruments rather than by actual transfers of physical possession or symbolic physical transfers, such as livery of seisin. 8 Thompson, G.W.,

Commentaries on the Modern Law of Real Property, Sec. 4220 (1981).

At common law, the theory of "first in time, first in right" prevailed and in a dispute between two grantees from the same grantor, the earliest dated deed prevailed. Recording statutes adopted by virtually all states have now displaced this rule. *Id.* at Sec. 4420. In a dispute between two grantees from the same grantor, the outcome is determined by the type of recording statute used. In general, there are three variations in recording statutes:

(1) "Race"—giving priority to the first transferee to record;

(2) "notice"—giving priority to the transferee who acquires an interest without notice of a prior transfer; and

(3) "race-notice"—giving priority to the transferee who acquires an interest without notice of a prior transfer only if that subsequent transferee is first to record.

6A Powell, R., *The Law of Real Property*, Sec. 905 (1981).

Section 503 as it is presently written is a recording statute which bears the essential earmarks of a "race-notice" statute. Insofar as Section 503(c) holds unfiled conveyances invalid as to third parties without actual notice, it contains the key attribute of a pure notice statute. 6A, Powell, R., *The Law of Real Property*, Sec. 905[1](b) (1981). Under Section 503(c) a prior transferee and a subsequent transferee can both be third parties without notice vis-a-vis one another. As between those two, the subsequent transferee will have a valid conveyance only if he files for recordation because under Section 503(d), 49 U.S.C. § 1403(d) (1981), a subsequent transferee's conveyance becomes valid as to all third parties without notice only upon filing. The fact that Congress required the Administrator to keep a record of the

time and date of filing implies that priority in time of filing affects the determination of priorities of competing interests. Section 503 is therefore in substance a race-notice statute.

Under any recording statute, questions of substantive validity of instruments arise. Issues such as delivery, fraudulent procurement, forgeries, or errors in deeds concern substantive validity of the instrument. In real estate law, these issues are normally resolved under common law principles. Because of the highly mobile nature of aircraft, a threshold problem is created in determining substantive validity of instruments, viz. which state's common law applies? This is a question non-existent in real estate conveyancing. It is the sole problem which Section 506, 49 U.S.C., Sec. 1406 (1981) addresses.

IV.

THE USE OF A RECORDING SYSTEM RATHER THAN TRANSFER OF PHYSICAL POSSESSION AS THE MEANS OF RESOLVING AIRCRAFT TITLE DISPUTES PROVIDES A CONSISTENT AND PRACTICAL MEANS OF DECIDING RECURRING TITLE PROBLEMS AND A PREDICTABLE RULE FOR FUTURE PROBLEMS.

A review of previously decided cases indicates that with respect to aircraft titles and encumbrances, four types of conflicts occur on a continuing basis: (a) a dealer sells an aircraft to a buyer in the ordinary course of business, but fails to remit the proceeds to the floor-plan lender who has previously recorded his security interest with the FAA, *e.g. Texas National Bank v. Aufderheide*, 235 F. Supp. 599 (E.D. Ark. 1964); (b) a mechanic who repairs an aircraft asserts a lien but records in accordance with state law, not with the FAA, *e.g. Crescent City Aviation v. Beverly Bank*, 219 N.S.2d 446 (1966); (c) two purchasers buy the same aircraft from the same seller,

Blalock v. Brown, 51 S.E.2d 610 (1949); and (d) a lender extends credit on an aircraft which was the subject of a prior unrecorded transaction, *e.g. Marsden v. Southern Flight Services*, 227 F. Supp. 411 (M.D.N.C. 1961). By employing the principles normally used to resolve title disputes under a race-notice recording statute these fact situations can be resolved consistently and predictably. Consistency and predictability will achieve the Congressional purpose of stability in aircraft financing.

A. Because Of The High Unit Cost Of Aircraft And Aircraft Parts A Prior Recorded Secured Creditor Should Prevail As Against Buyer In The Ordinary Course Of Business.

Much of the litigation arising under Section 506, 49 U.S.C., Sec. 1406 (1981), concerns the validity of a prior recorded security interest in an aircraft that is entrusted to a merchant dealing in aircraft, who sells the secured aircraft to a buyer in the ordinary course. In many cases, though not all, a buyer in the ordinary course has prevailed over a previously recorded security interest. Cases involving this question include: *Gary Aircraft Corp. v. General Dynamics Corp.*, 681 F.2d 365 (5th Cir. 1982); *Sanders v. M. D. Aircraft Sales, Inc.*, 575 F.2d 1086 (3rd Cir. 1978); *Haynes v. General Electric Credit Corp.*, 432 F. Supp. 763 (D.C. Va. 1977); *Northern Illinois v. Bishop Distributing*, 284 F. Supp. 121 (D.C. Mich. 1968); *U.S. Aviation Underwriters, Inc. v. WTAE Flying Club*, 300 F. Supp. 341, 348 (D.C. Pa. 1969); *Bitzer-Croft Motors v. Pioneer Bank & Trust*, 82 Ill. App. 3d 1, 401 N.E.2d 1340 (1980). In these cases, the courts have opted in favor of the policy contained in Section 9-307, Ill. Rev. Stat. Ch. 26, Sec. 9-307 (1978) that a buyer in the ordinary course of business has the right to assume that the merchant can sell the commodity being purchased and that the buyer should not be required to make a record search

before purchasing or verify that the merchant obtains a valid release of the item from a bank floor plan or security interest. See *Texas National Bank v. Aufderheide*, 235 F. Supp. 599 (E.D. Ark. 1964); and *State Securities Co. v. Aviation Enterprises*, 355 F.2d 225 (10th Cir. 1966).

Cases which reject the policy of 9-307 include *Dowell v. Beech Acceptance Corp.*, 91 Cal. Rptr. 1, 476 P.2d 401 (1971); *O'Neill v. Barnett Bank of Jacksonville, N.A.*, 360 So. 2d 150 (1978); *Pope v. National Aero Finance Co.*, 236 Cal. App. 2d 722, 46 Cal. Rptr. 233 (1965); and *Dawson v. General Discount Corp.*, 82 Ga. App. 39, 60 S.E.2d 653 (1950).

A major purpose of Section 503 is to promote the civil aircraft industry by creating a stable financial environment to attract investment in aircraft. The purpose of Section 9-307 is to promote retail commerce by insuring the free alienability of retail goods. Because Congress had decided that commerce is best promoted in the civil aircraft industry by employing a recording system, it is submitted that the protection provided to a buyer in the ordinary course under Section 9-307 is neither desirable nor necessary for an aircraft purchaser, lender or investor. Given the high unit cost of aircraft and the relative infrequency of aircraft purchases as compared to normal consumer goods, commerce in this field is best promoted by giving lenders, purchasers and sellers a precise way of determining with certainty the legal status of their interests.

Requiring the aircraft purchaser to get a release of all prior liens is not a substantial burden if a reliable index is available. In the case now before this court the Respondent, Maurice Shacket, testified that he was aware of the registration requirement pertaining to aircraft. He himself prepared a bill of sale and a registration form in

connection with the sale of his 1972 Pipe Aztec in 1975. (R. MS-2 Dep. 20-25) In his transaction with Smith, Inc. in 1978 he stated under oath that he was withholding the bill of sale to his trade-in aircraft until he received title to the new 1978 Piper Navajo. (R. MS-2 Dep. 17-23; R. 52, 53 [M. Shacket Affidavit Exhibit A to Philko's Section 60(b) Motion]) If Mr. Shacket had demanded the original bills of sale on April 19, 1978 instead of ignoring the documents he received, Roger Smith would not have been able to use these instruments to defraud anyone. Under the current state of the law, lenders are understandably reluctant to engage in aircraft financing when the FAA Central Registry can be used as a means of aiding in the commission of a fraud. It is submitted that this is not the type of environment which Congress contemplated when enacting Sections 503 or 506.

B. Mechanic's Liens On Aircraft Should Not Be Valid As To Third Parties Without Notice Unless Recorded.

Most states have statutes which give a person who repairs personal property, including aircraft, a lien for the labor and materials supplied. *See, e.g.*, 42 Okla. Stat. Sec. 97 (1971). In some states, the lien is a possessory lien only. *See*, Ill. Rev. Stat. Ch. 82, Sec. 47(a) (1982). In other states the artisan can perfect his lien by recording in accordance with local state law. Most lower courts have held that an artisan's lien under state law can have no validity as to third parties without notice. One typical case is *Crescent City Aviation v. Beverly Bank*, 219 N.E.2d 446 (1966). In *Crescent City, id.*, a mechanic's lien claimant made repairs to an aircraft in Indiana pursuant to a contract with the aircraft's owner and filed his claim for lien with the local recorder as provided by Indiana law. His lien was found to be null and void as against a prior secured creditor who recorded with the FAA. Holding

that the federal recording statute pre-empted state lien law the Court stated:

> The validity of this lien or of any conveyance within the purview of the FAA is a question to be determined by applying the law of the jurisdiction where the instrument is delivered. *But there is no question of validity or for [sic] construction of the instrument that can be determined until the lien is filed under the Federal Act.* [Emphasis added].

Id. at 449.

Of like effect are: *Holliday Airlines Corp. v. Pacific Propeller, Inc.*, 620 F.2d 731 (9th Cir. 1980) where the lien claimant who recorded with the FAA against an aircraft of Holliday Airlines Corp. prevailed over Holliday's trustee in bankruptcy; and *McCormack v. Air Center Inc.*, 571 P.2d 835 (Okla. S. Ct. 1977) in which a federally recorded claim for lien was found to be enforceable against a subsequent federally recorded purchaser.

In resolving disputes concerning mechanic's liens Section 503(c) mandates the necessity and place of recording. Once recorded, a mechanic's lien will be valid as against third parties if under state law the mechanic has otherwise complied with local law (e.g., recorded his lien in a timely manner; complied with local law as to the statements required to be made in the lien claim.

C. Between Competing Purchasers Of The Same Aircraft The First To Record Should Prevail.

If two parties acting in good faith purchase the same aircraft from the same seller, three possibilities may be presented: (1) one of the purchasers fails to obtain the necessary bills of sale, as in the case now before the Court; (b) both purchasers receive bills of sale; or (c) neither party receives bills of sale. In the first situation,

since only one party receives the bills of sale his conveyance becomes valid as against the other upon filing with the FAA. In the second situation, both parties are entitled to file their bills of sale. Most likely, one set of those bills of sale will be authentic and one will be forged. The substantive validity of the documents can be determined under the state law as provided under Section 506. Under the relevant state laws, the party with the valid bills of sale will prevail. If both parties have bills of sale which are valid under the applicable state law, the first to record should prevail, as in *Blalock v. Brown*, 51 S.E.2d 610 (1949). In the third situation where neither party has the required instruments for recording, they would remain at risk until they were able to file some valid instrument with the FAA. However, there appears to be no restriction against filing some form of unilateral declaration of ownership which should provide notice to all third parties of the purchaser's claimed interest in the subject aircraft. The validity of this or any other interest will ultimately have to be resolved by resort to state court as provided by Section 506. Because of the highly mobile nature of aircraft, in any of the above fact situations recording is a far more reliable indicia of title than possession.

D. A Lender Who Extends Credit On An Aircraft Which Has Been The Subject Of A Prior Unrecorded Conveyance Should Be Treated As A Subsequent Good Faith Purchaser.

A lender typically extends credit for aircraft purchases on the strength of original bills of sale and the facts shown at the FAA Central Registry. See Deposition of Richard Andrews (App. 6-7). Where the pledged aircraft has been the subject of a prior unrecorded sale, the lender is in the same position as a competing purchaser

from the same seller, discussed in C above. This was the issue presented in *Marsden v. Southern Flight Service*, 227 F. Supp. 411 (M.D.N.C. 1961). In this case, the District Court resolved the dispute in favor of the lender because the prior purchaser failed to record. The Court stated at 227 F. Supp. 419:

> And in fact, the equities of the case, if not the hardship, are not altogether with the plaintiff. The burden of recording the bill of sale rested on the purchaser-plaintiff. His failure to cause it to be recorded promptly caused the loss in question. He operated the plane for more than eight months without the registration certificate but was never suspicious of his failure to receive it. In flying the aircraft without having obtained a certificate of registration in this period of time, the plaintiff may have been in violation of 49 U.S.C.A. Sec. 1401.

The court therefore treated the lender as a good faith purchaser without notice. This is consistent with the Uniform Commercial Code, Ill. Rev. Stat., Ch. 26, Sec. 1-101 *et seq.* (1978). Section 1-201(33) defines "purchaser" as one who takes by purchase. Section 1-201(32) defines purchase to include taking "by sale, discount, negotiation, mortgage, pledge, lien, issue or reissue, gift or any other voluntary transaction creating an interest in property." In the present controversy, the trial court viewed Philko's transaction as a credit transaction rather than a purchase. Assuming, *arguendo* that Philko was a lender in its transaction, Philko nevertheless should prevail because it was, under state law, a good faith purchaser without notice of Smith, Inc.'s purported conveyance to Shacket.

CONCLUSION

The objectives of Congress in enacting Title V of the Federal Aviation Act, 49 U.S.C. Sec. 1401 *et seq.* (1981) can only be achieved if the recording system contained in Section 503(c) is enforced. Parties who fail to file or record their conveyances must not be allowed to prevail against those who rely upon the FAA Central Registry in purchasing or financing aircraft. Enforcing Section 503(c) by nullifying unrecorded conveyances as against third parties without notice will allow the ready determination of each and all interests in aircraft, and promote rather than discourage financial transactions in aircraft and their component parts. In addition, it will better enable the Administrator to monitor the airworthiness of all civil aircraft by creating a reliable index of aircraft owners. For these reasons, Petitioner Philko Aviation, Inc. urges this Court: (a) to reverse the decision of the District Court and Court of Appeals below; (b) to enter a declaratory judgment order pursuant to 29 U.S.C. Sec. 2255 (1982) declaring Philko Aviation, Inc. as the rightful owner of the 1978 Piper Navajo Aircraft registered in Philko's name as number N 78 MS; (c) to remand this case for a determination of the amount of damages to which Philko is entitled for the loss of use of the 1978 Piper Navajo aircraft during the pendency of these proceedings; and (d) to grant such other relief in aid of the foregoing as this Court may deem just.

Respectfully submitted,

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APPENDIX

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. art. VI

Article VI

* * *

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

49 U.S.C. Sec. 1403 (1981)

§ 1403. Recordation of aircraft ownership

(a) Establishment of recording system. The Administrator [Secretary of Transportation] shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;

(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff shaft horsepower, and also any assignment or amendment thereof or supplement thereto;

(3) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 604(b) of this Act [49 USCS § 1424(b)] for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances, and spare parts covered thereby and designate the location or locations thereof; and also any assignment or amendment thereof or supplement thereto;

(b) Recording of releases, cancellations, discharges, or satisfactions. The Administrator [Secretary of Transportation] shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

(c) Validity of conveyances or other instruments, filing. No conveyance or instrument the recording of which is provided for by section 503(a) [subsec. (a) of this section] shall be valid in respect of such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Administrator [Secretary of Transportation]: Provided, That previous recording of any conveyance or instrument with the Administrator of the Civil Aeronautics Administration under the provisions of the Civil Aeronautics Act of 1938 shall have the same force and effect as though recorded as provided herein; and conveyances, the recording of which is provided for by section 503(a)(1) [subsec. (a)(1) of this section] made on or before August 21, 1938, and instruments, the recording of which is provided for by sections 503(a)(2) and 503(a)(3) [subsecs. (a)(2) and (a)(3) of this

section] made on or before June 19, 1948, shall not be subject to the provisions of this subsection.

(d) Effect of recording. Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation, except that an instrument recorded pursuant to section 503(a)(3) [subsec. (a)(3) of this section] shall be effective only with respect to those of such items which may from time to time be situated at the designated location or locations and only while so situated: Provided, That an instrument recorded under section 503(a)(2) [subsec. (a)(2) of this section] shall not be affected as to the engine or engines, or propeller or propellers, specifically identified therein, by any instrument theretofore or thereafter recorded pursuant to section 503(a)(3) [subsec. (a)(3) of this section].

(e) Form of conveyances or other instruments. Except as the Administrator [Secretary of Transportation] may by regulation prescribe, no conveyance or other instrument shall be recorded unless it shall have been acknowledged before a notary public or other officer authorized by the law of the United States, or of a State, territory, or possession thereof, or the District of Columbia, to take acknowledgment of deeds.

(f) Index of conveyances and other instruments. The Administrator [Secretary of Transportation] shall keep a record of the time and date of the filing of conveyances and other instruments with him and of the time and date of recordation thereof. He shall record conveyances and other instruments filed with him in the order of their reception, in files to be kept for that purpose, and indexed according to—

(1) the identifying description of the aircraft, aircraft engine, or propeller, or in the case of an instrument referred to in section 503(a)(3) [subsec. (a)(3) of this section], the location or locations specified therein; and

(2) the names of the parties to the conveyance or other instrument.

(g) Regulations. The Administrator [Secretary of Transportation] is authorized to provide by regulation for the endorsement upon certificates of registration, or aircraft certificates, of information with respect to the ownership of the aircraft for which each certificate is issued, the recording of discharges and satisfactions of recorded instruments, and other transactions affecting title to or interest in aircraft, aircraft engines, propellers, appliances, or parts, and for such other records, proceedings, and details as may be necessary to facilitate the determination of the rights of parties dealing with Civil aircraft of the United States, aircraft engines, propellers, appliances, or parts.

(h) Previously unrecorded ownership of aircraft. The person applying for the issuance or renewal of an airworthiness certificate for an aircraft with respect to which there has been no recordation of ownership as provided in this section shall present with his application such information with respect to the ownership of the aircraft as the Administrator [Secretary of Transportation] shall deem necessary to show the persons who are holders of property interests in such aircraft and the nature and extent of such interests.

49 U.S.C. Sec. 1406 (1981)

§ 1406. Law governing validity of certain instruments

The validity of any instrument the recording of which is provided for by section 503 of this Act [49 USCS § 1403] shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein, it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

Ill. Rev. Stat. Ch. 26, Sec. 2-401 (1978)

§ 2-401. Passing of Title; Reservation for Security; Limited Application of this Section

Each provision of this Article with regard to the rights, obligations and remedies of the seller, the buyer, purchasers or other third parties applies irrespective of title to the goods except where the provision refers to such title. Insofar as situations are not covered by the other provisions of this Article and matters concerning title become material the following rules apply:

(1) Title to goods cannot pass under a contract for sale prior to their identification to the contract (Section 2-501), and unless otherwise explicitly agreed the buyer acquires by their identification a special property as limited by this Act. Any retention or reservation by the seller of the title (property) in goods shipped or delivered to the buyer is limited in effect to a reservation of a security interest. Subject to these provisions and to the provisions of the Article on Secured Transactions (Article 9), title to goods passes from the seller to the buyer in any manner and on any conditions explicitly agreed on by the parties.

(2) Unless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes his performance with reference to the physical delivery of the goods, despite any reservation of a security interest and even though a document of title is to be delivered at a different time or place; and in particular and despite any reservation of a security interest by the bill of lading

(a) if the contract requires or authorizes the seller to send the goods to the buyer but does not require him to deliver them at destination, title passes to the buyer at the time and place of shipment; and

(b) if the contract requires delivery at destination, title passes on tender there.

(3) Unless otherwise explicitly agreed where delivery is to be made without moving the goods,

(a) if the seller is to deliver a document of title, title passes at the time when and the place where he delivers such documents; or

(b) if the goods are at the time of contracting already identified and no documents are to be delivered, title passes at the time and place of contracting.

(4) A rejection or other refusal by the buyer to receive or retain the goods, whether or not justified, or a justified revocation of acceptance revests title to the goods in the seller. Such revesting occurs by operation of law and is not a "sale". 1961, July 31, Laws 1961, p. 2101, § 2-401.

Ill. Rev. Stat. Ch. 26, Sec. 2-403 (1978)

§ 2-403. Power to Transfer; Good Faith Purchase of Goods; "Entrusting"

(1) A purchaser of goods acquires all title which his transferor had or had power to transfer except that a purchaser of a limited interest acquires rights only to the extent of the interest purchased. A person with voidable title has power to transfer a good title to a good faith purchaser for value. When goods have been delivered under a transaction of purchase the purchaser has such power even though

(a) the transferor was deceived as to the identity of the purchaser, or

(b) the delivery was in exchange for a check which is later dishonored, or

(c) it was agreed that the transaction was to be a "cash sale", or

(d) the delivery was procured through fraud punishable as larcenous under the criminal law.

(2) Any entrusting of possession of goods to a merchant who deals in goods of that kind gives him power to transfer all rights of the entruster to a buyer in ordinary course of business.

(3) "Entrusting" includes any delivery and any acquiescence in retention of possession regardless of any condition expressed between the parties to the delivery or acquiescence and regardless of whether the procurement of the entrusting or the possessor's disposition of the goods have been such as to be larcenous under the criminal law.

(4) The rights of other purchasers of goods and of lien creditors are governed by the Articles on Secured Transactions (Article 9), Bulk Transfers (Article 6) and Documents of Title (Article 7). 1961, July 31, Laws 1961, p. 2101, § 2-403.

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No. 82-342

In the

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,
Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

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QUESTION PRESENTED

Because the "Question Presented" in the Petition for Writ of Certiorari and repeated by the petitioner and *amicus curiae* in their briefs does not fully or fairly state the issue presented in this case, respondents submit the following formulation of the question for review:

> Whether a prior bona fide purchaser of an aircraft with possession whose ownership interest, because of fraud by the seller, is not recorded with the Federal Aviation Agency pursuant to Section 503 of the Federal Aviation Act has a superior right to a subsequent purchaser with an interest voidable under applicable state law who records under Section 503.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1982

No. 82-342

PHILKO AVIATION, INC.,

Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE RESPONDENTS

STATEMENT OF THE CASE

A. Background

In April of 1978, Roger Smith Aircraft Sales, Inc. ("Smith Aircraft"), an aircraft dealership located in DuPage County, Illinois, sold a new, custom-built Piper Navajo aircraft to the respondents, Maurice and Sylvia

Shacket ("Shackets"). 497 F. Supp. at 1263.[1] The Shackets took possession of their aircraft at the time of the sale but did not record the original bill of sale with the Federal Aviation Administration ("FAA") on the understanding that Smith Aircraft would do so. *Id.* at 1264. Shortly thereafter, Smith Aircraft purported to sell the same aircraft to the petitioner, Philko Aviation, Inc. ("Philko"), a company related to Smith Aircraft. The purported sale to Philko was financed by the Sandwich State Bank ("Bank") which purported to acquire a security interest in the Shackets' aircraft. *Id.* at 1265.

Philko has never had possession of the aircraft nor did it contemplate obtaining possession since the sole purpose of its purported purchase of the aircraft was a credit transaction to accomodate Smith Aircraft. *Id.* at 1269-1270. Smith Aircraft claimed to have a buyer, Krueger Aviation ("Krueger"), for the aircraft but did not have sufficient funds or credit to complete the purchase in the first instance from the Piper franchise dealer, Clark Aviation ("Clark"). *Id.* at 1264-1265. Thus, Philko obtained a loan from the Bank in order to provide Smith Aircraft with the necessary funds to purchase the aircraft from Clark. The anticipated sale to Krueger, of

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[1] References to the facts herein are primarily made to the decision by the District Court below (497 F. Supp. 1262) which contains a detailed recitation of the facts. The Circuit Court expressly affirmed the District Court's ruling that there were no material facts in dispute, a ruling which was not challenged by the petitioner and is not before this Court. 681 F.2d at 531. Where reference to a specific deposition transcript is required respondents adopt the abbreviated references used by the petitioner (Brief For Petitioner, p. 3 n. 1).

course, did not take place but was merely part of Smith Aircraft's fraudulent scheme to sell the same aircraft to multiple buyers. *Id.* at 1263.

Upon learning of the interests claimed by Philko and the Bank in their aircraft as a result of Smith Aircraft's fraud, the Shackets filed an action for declaratory judgment regarding the ownership rights to the aircraft. On cross motions for summary judgment the United States District Court for the Northern District of Illinois granted summary judgment in favor of the Shackets, declaring that they own their aircraft free of any claims of Philko or the Bank. *Id.* On appeal, the United States Court of Appeals for the Seventh Circuit affirmed the District Court's judgment. 681 F.2d 506.

B. The First Sale To The Shackets

In 1977 Maurice Shacket, a private pilot and owner of a small aircraft for several years, and his wife, Sylvia, contracted to purchase a custom-built Piper Navajo airplane for $126,000 together with the trade-in of the Shackets' current plane valued at $120,000. 497 F. Supp. at 1264. The Shackets paid Smith Aircraft $20,000 as a down payment upon signing the purchase contract. *Id.*

Smith Aircraft then contracted to obtain the aircraft from Clark. The Shackets were aware of the arrangements between Smith Aircraft and Clark, the area Piper franchisee, and, indeed, were in direct contact with Clark regarding customizing their aircraft before final delivery. *Id* .

Prior to closing on the new aircraft, Smith Aircraft found a buyer for the Shackets' trade-in. The Shackets

accordingly relinquished possession of their used airplane, retaining the title papers as security until the completion of the customizing, and concomitant closing, on their new plane. *Id.*

At the closing on April 18, 1978, the Shackets endorsed and delivered to Smith Aircraft two cashiers' checks, aggregating $106,000. However, because the Shackets were aware that Clark had certain financial problems with Smith Aircraft and requested to have a representative at the Shackets' closing, the Shackets did not tender the $106,000 to Smith Aircraft until after the Clark representative responded affirmatively to the Shackets' direct inquiry with respect to whether it was acceptable to close the purchase transaction. *Id.* The Clark representative then proceeded to show the Shackets the aircraft and gave them various manuals, the certificate of airworthiness, and the keys. *Id.*

At the closing, however, Roger Smith ("Smith"), the president of Smith Aircraft, failed to give the Shackets all of the proper bills of sale reflecting the entire chain of title to the aircraft. *Id.* Rather, Smith advised the Shackets that additional clerical work needed to be completed. He therefore supplied the Shackets with only the purchaser's copy of the bill of sale from Smith Aircraft to the Shackets and photocopies of the prior bills of sale relating to the earlier transfers from Piper to Clark and Clark to Smith Aircraft. *Id.* Smith assured the Shackets that he would "take care of the paperwork", which the Shackets understood to include the recordation of the original bills of sale with the FAA. *Id.* Following the closing, the Shackets flew their new aircraft home to Detroit and have retained possession ever since. *Id.*

Smith did not complete the "paperwork" as promised and the original bills of sale were not recorded with the FAA.

C. The Purported Second Sale To Philko

On April 20, 1978, only two days after the closing and delivery of the aircraft to the Shackets, Smith began to arrange the purported second sale of the same aircraft to Philko. Unlike the Shackets, Philko did not first learn of Smith Aircraft by an advertising flyer. *Id.* at 1265. Rather, Philko is a corporation which was acquired by Edward McArdle ("McArdle") in 1977 at the suggestion of Smith and has numerous business relationships with Smith Aircraft. The backdrop to the Smith Aircraft/Philko relationship is as follows.

In 1977 Smith, who desired to expand his business operations, learned that a corporation which was the lessee of all aircraft operations at the Aurora Airport (Philko's predecessor) was for sale. *Id.* Smith lacked the financial capability to acquire the corporation and, therefore, approached McArdle for financial assistance, proposing that McArdle purchase the corporation and sublease its airport operations to Smith Aircraft. *Id.*

McArdle agreed, purchased the corporation, and merged it with one of his other corporations to create Philko. Pursuant to Smith's proposal Philko then subleased the airport to Smith Aircraft. The sublease arrangement between Philko and Smith Aircraft became more than the conventional lessor-lessee relationship since Smith Aircraft agreed to perform, *inter alia*, all obligations imposed on Philko as lessee to the City of Aurora. McArdle and Smith further contracted to conduct several related businesses, in Philko's name but performed by

Smith Aircraft, including the operation of a flight school, rendering maintenance services, and sales of new Piper aircraft. *Id.*

Additionally, during 1977 McArdle assisted Smith Aircraft in at least two major financing transactions: (1) a guaranty of $100,000 of Smith Aircraft's $500,000 bank line of credit; and (2) a loan of $800,000 made in December of 1977. *Id.* at 1266. Finally, in late 1977 McArdle proposed to purchase the stock of Smith Aircraft and Philko paid a $5000 advance for this potential stock purchase. That transaction, however, was not consummated and the payment returned to McArdle. *Id.*

It was, therefore, in this context that Smith approached McArdle regarding the "sale" of the Shackets' aircraft. On April 20, 1978, Smith told McArdle that Smith Aircraft had contracted to purchase a new Piper Navajo from Clark (in fact, the same plane the Shackets had purchased two days earlier and flown to Detroit) for which Smith Aircraft had already contracted to resell to a third party in California, Krueger. *Id.* at 1264. According to what Smith told McArdle, Smith was unable to obtain the additional $152,000 necessary to complete the purchase from Clark. Thus, if Philko would obtain a bank loan to advance the funds Smith would repay the Philko bank loan from the proceeds of the Krueger sale. *Id.* at 1265. In addition, $60,000 of the Krueger proceeds would be applied to the remaining sum due Philko on the $80,000 loan Philko had previously made to Smith Aircraft. McArdle further understood from Smith that any balance from the Krueger proceeds would belong to Smith Aircraft. *Id.*

After examining the original prior bills of sale, McArdle and the Bank agreed to have Philko take title to

the aircraft so that it, in turn, could obtain the $152,000 loan from the Bank which would take a security interest in the aircraft. *Id.* McArdle and the Bank were also advised by Smith that the aircraft was not currently in the possession of Smith Aircraft but located at a Piper dealership in Michigan where it was being equipped with certain electronic equipment. *Id.* Neither McArdle nor the Bank took any action to confirm Smith's representations as to the location of the aircraft and that Krueger had agreed to purchase the aircraft. Similarly, no inquiry was made of Smith as to how he had obtained the original bills of sale without having paid Clark the $152,000. (R. EM Dep. 62-69; RA Dep. 21, 40)

On April 21, three days following the Shackets' closing and three days prior to the closing on the purported Philko sale, the Bank conducted a document search on the aircraft with the FAA which revealed that the aircraft was as yet unregistered. (R. RA Dep. 109-110) On April 24, Smith attended his second closing within a week for the sale of the same aircraft, an aircraft which was then in the possession of the first purchasers, the Shackets. 497 F. Supp. at 1262. At this closing, unlike the first, Smith presented and delivered the original bills of sale to the Bank representative. *Id.* The Bank, however, did not initiate a recording of those instruments immediately after the closing but rather, mailed them to the FAA on May 25, over thirty days later. (R. RA Dep. 130-35) Accordingly, the bills of sale were not filed with the FAA until May 31. (App. to Petition, E 41a) Almost two weeks later, on June 13, the FAA recorded the instruments to show that Philko was the registered owner of the aircraft and that the Bank held a security interest for the $152,000 it loaned to Philko. (App. to Petition, E 41a-44a)

D. The Decisions In The Lower Courts

On September 22, 1980 Judge Milton I. Shadur of the United States District Court for the Northern District of Illinois granted summary judgment in favor of the Shackets. In reaching that determination the District Court first found that no genuine issues as to any material fact existed. In the application of those undisputed facts to the law Judge Shadur held that: (1) the Shackets were good faith purchasers of the aircraft from Smith Aircraft; (2) Philko was not a good faith purchaser; (3) the "sale" to Philko was, at most, a credit transaction, granting Philko a security interest in the aircraft; (4) the federal recording provisions of the Federal Aviation Act preempt only state aircraft recording or registration laws and do not override state law principles governing priorities among conflicting interests; and (5) under the applicable state law principles, the prior unrecorded interest of the Shackets as good faith purchasers was superior to the subsequent recorded security interest of Philko.

On appeal to the Seventh Circuit the District Court's summary judgment in favor of the Shackets was affirmed. In the opinion, Chief Judge Howard T. Markey[2] concluded that: (1) the District Court correctly found that there was no genuine issue of material fact; (2) the District Court's ruling that state law governs the validity of the transfers of aircraft was correct; (3) the Shackets did obtain valid title to the aircraft as bona fide purchasers under applicable state law; and (4) Philko

[2] Chief Judge Markey, Chief Judge of the United States Court of Customs and Patent Appeals, was sitting by designation.

acquired no title or interest in the aircraft from Smith Aircraft under applicable state law.

SUMMARY OF ARGUMENT

Petitioner seeks to have this Court construe Section 503 of the Federal Aviation Act in such a manner that the mere recording of a purported instrument of conveyance validates that purported interest in the aircraft irrespective of an inherent invalidity in the underlying transaction. In other words, the petitioner argues that an unrecorded ownership interest in an aircraft conveyed prior in time to a recorded instrument can never be superior to the holder of the subsequent instrument even if the subsequent conveyance was invalid.

Respondents respectfully submit that such a construction which, in effect, equates nonrecording of an instrument with its invalidity, is: (1) contrary to the goals and purposes of the recording provisions of the Federal Aviation Act; (2) not supported by an objective reading of the relevant statutory language or the legislative history; and (3) would result in anomalous and irrational results. In contrast, construing Section 503 as preempting state law only as to state recording statutes and not with respect to the substantive validity of title or ownership interests and priorities is perfectly consistent with the objectives of the Federal Aviation Act and will not, as the *amicus curiae* suggests, undermine International Conventions to which the United States is a party or impair or jeopardize the aircraft finance industry.

A thorough examination of the legislative history reveals that the predecessor of Section 503 (which has been essentially unchanged since 1938) was enacted merely

to simplify the task of recording aircraft security interests. It was Congress' intent to leave the priority determinations and substantive validity of the purported interests to state law. This clear purpose, which is manifested by the legislative hearings and revisions Congress made to early versions of the bill which was ultimately enacted, is further buttressed by comparing the Act to the Ship Mortgage Act. Unlike the Federal Aviation Act, the Ship Mortgage Act, which was enacted well before the first precursor of Section 503, is an example of a statute where Congress clearly preempted state law as to recording and priorities.

That Section 503 does not preempt state law as to determining the validity of conveyances is further demonstrated by Sections 501(f) and 506 of the Act. Those sections, on their face, and as shown in the legislative history, limit the effect and scope of Section 503's recording requirement. Sections 501(f) and 506 clearly demonstrate that the central recording system established by Section 503 does not impact upon the substantive state law regarding the validity of the conveyance and priorities.

The facts of this case graphically demonstrate the ludicrous and irrational results which could result from the immutable application of Section 503 as proposed by the petitioners and *amicus curiae* which makes recording an absolute prerequisite in order to prevail against *any* subsequently recorded document. The Shackets were undeniably good faith purchasers of the aircraft who failed to promptly record their title to their aircraft as a result of a fraud perpetrated by the seller of the aircraft. In contrast, Philko, which held numerous intimate business relationships with the seller, entered into a

credit transaction with respect to the aircraft also as a result of the fraud of the seller of the aircraft. However, at the time of that credit transaction, the seller, under applicable state law, no longer held any interest in the aircraft and, accordingly, could not convey any ownership or security interest to anyone except another bona fide purchaser—something Philko was clearly not. Accordingly, since the documents recorded on behalf of Philko were unquestionably invalid, to divest the Shackets of their title and ownership rights to the aircraft in favor of Philko would be tantamount to the Court's endorsement of exalting form over substance.

Assuming, *arguendo,* that the Court accepts the construction of Section 503 urged by the petitioner and *amicus curiae,* the facts of this case nevertheless support an affirmance of the lower court's judgment in favor of the respondents. Section 503, by its express terms, does not apply to a party with an unrecorded interest as to any third party who records but had "actual notice" of the prior unrecorded interest. It is well-settled that under applicable state and federal law that "actual notice" includes circumstances which should have provoked further inquiry which would have revealed the prior conveyance. In the instant situation, the Record is replete with undisputed facts sufficient to have placed Philko on further inquiry. Thus, at least as to Philko, the Shackets' interest is superior even though unrecorded by virtue of Philko's actual notice thereof.

Lastly, the express and implied arguments by both the petitioner and the *amicus curiae* that aircraft financing will become difficult to obtain unless Section 503 is construed as a total and absolute preemption of state law with

respect to determining ownership rights and priorities of unrecorded conveyances cannot withstand an objective analysis. Essentially, their position is that if lenders must look to each state to determine substantive validity regarding titles and priorities then the difficulty involved in financing aircraft will increase as will the lenders' risk. This argument is superficial and is flawed for at least three reasons.

First, it ignores the undisputed choice of law directive provided in Section 506 which eliminates any uncertainty as to the appropriate state law which will govern. Secondly, all but one state[3] and the District of Columbia have adopted the relevant sections of the Uniform Commercial Code, eliminating the alleged burden and difficulty for the lenders to learn all fifty states' priority laws. Finally, no reason has been suggested to justify relieving the lenders of a "burden" which they routinely confront with respect to financing other expensive personal property needed by businesses such as construction equipment, machine tools and the myriad of other large equipment items financed by banks and other financial institutions.

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[3] Louisiana, of course, has still failed to adopt any provisions of Article Two.

ARGUMENT

I. THE FEDERAL AVIATION ACT DOES NOT PREEMPT STATE LAW RELATING TO OWNERSHIP RIGHTS AND OTHER PROPERTY INTERESTS IN AIRCRAFT OR THEIR RELATIVE PRIORITIES.

A. The Relevant Statutory Language Of The Act Is Consistent With Limiting The Preemptive Effect To State Recording Laws.

This case presents the question of whether precise and established principles of state property rights should give way to an ambiguous federal statute which does no more than provide a national repository for recording interests in aircraft. The facts here bring sharply into focus the tension between the prior purchase in good faith by a consumer with incontestable state property rights and a later purchase by a merchant without any valid state interest who seeks to extinguish all prior rights by a recording under the federal provision.

Section 503 of the Federal Aviation Act, 49 U.S.C. §1403 (hereinafter referred to as "Act") does preempt state recording laws with respect to aircraft. Such limited preemptive effect has not been seriously challenged by the lower courts.[4] Indeed, the undisputed

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[4] *See, e.g., Gary Aircraft Corp.* v. *General Dynamics Corp.*, 681 F.2d 365, 368 (5th Cir. 1982); *Texas National Bank* v. *Aufderheide*, 235 F. Supp. 599, 603 (E.D.Ark. 1964). *See generally* Annot., *Construction & Effect of 49 U.S. Code §1403, Governing Recordation of Ownership, Conveyances, and Encumbrances on Aircraft*, 22 A.L.R. 3d 1270.

goal of establishing a central federal recording system could not be achieved if state recording statutes were allowed to compete. What the Act does not do, however, is preempt state law with respect to the substantive validity of the instruments recorded or determine priorities between ownership claims.

Preemption is disfavored for the Supremacy Clause only requires state law to be subordinated if it directly conflicts with a federal statute, frustrates a federal scheme, Congress has unmistakably so ordained, or the nature of the regulated matter permits no other conclusion. *See Chicago & Northwestern Transportation Co.* v. *Kalo Brick & Tile Co.*, 450 U.S. 311, 317 (1981); *Malone* v. *White Motor Corp.*, 435 U.S. 497, 504 (1978); *Florida Lime & Avocado Growers, Inc.* v. *Paul.*, 373 U.S. 132, 146 (1963). The pertinent statutory language is incurably ambiguous, and cannot be read to mandate preemption of any state laws except those which directly relate to recording conveyances of aircraft. Sections 503(c) and (d) merely provide that:

> (c) No conveyance or instrument the recording of which is provided for by section 503(a) shall be valid in respect of such aircraft . . . against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation . . .
>
> (d) Each conveyance or other instrument recorded by means of or under the system provided for in subsection (a) or (b) of this section shall from the time of its filing for recordation be valid as to all persons without further or other recordation. . . .

49 U.S.C. §1403(c), (d).

The phrase in Section 503, "shall be valid . . ." simply does not speak to priorities. To the contrary, none of the Act's provisions require that recorded interests, however frail, shall be superior to prior valid interests recorded subsequently. In the most recent decision to comprehensively examine the effect of this statutory language, *Gary Aircraft Corp.* v. *General Dynamics Corp.*, 681 F.2d 365 (5th Cir. 1982), the Court of Appeals for the Fifth Circuit concluded that the statute did not preempt state law regarding priorities. The studious and cogent analysis of the statute by Judge Wisdom in that decision confirms the persuasive conclusions.

> Subsections 503(c) and (d) provide that no instrument shall be valid (except against the parties to the instrument and parties with actual knowledge) until filed and that, once filed with the Federal Aviation Administration, all instruments shall be "valid" without further recordation. But "validity" need not establish priority. On the contrary, it may mean nothing more than that recordation with the FAA will assure the instrument such "validity" as state law grants a recorded instrument. As the district court noted, if the term "valid" refers to enforceability, a literal interpretation of the language would lead to irrational results—one could create an enforceable interest in an aircraft without giving any value simply by recording it with the FAA. Still, we could read the statute as giving "validity" in the sense of priority to recorded interests *otherwise* "valid" under state law—that is, "valid" in the sense of complying with formalities and requirements of consideration.

Id. at 370-71 (emphasis original, footnote omitted). Judge Wisdom further explained that:

> [S]ection 503 makes *every* recorded interest "valid" against *all* persons; if "valid" means enforceable, section 503 makes all recorded interests enforceable against all other recorded interests—a logical impossibility for a priority system. Only by assuming the conclusion can one make section 503 a system according priority to recorded interests in order of time of filing.

Id. at 371, n. 9 (emphasis original).

While the facts in *Gary Aircraft* address a subsequent unrecorded interest and not a prior one as in this case, its convincing logic is no less applicable. In fact, the absence of preemption of state substantive law based on the language of the statute, in the case of a prior unrecorded interest, is even stronger since Section 503(c) states that an instrument shall not be valid against third parties *"until"* it is filed, not that it can never be.[5] In short, the Act simply cannot be logically interpreted as addressing priorities or the substantive validity of conveyances. Thus, the petitioner's opening argument that an irreconcilable conflict exists between Section 503 and Section 2-401 of the Uniform Commercial Code (Brief For The Petitioner, pp. 13-14) falls since it is predicated upon the erroneous assumption that Section 503 affirmatively creates an interest to third parties simply because of the failure of the parties to a conveyance to record.

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[5] The Shackets, of course, have not been able to record their interest despite efforts to do so because Smith fraudulently gave the original bills of sale to the Bank which recorded them. It was because of their inability to record with the FAA's central registry that the Shackets initiated this declaratory judgment action. 497 F. Supp. at 1264.

In contrast to the Federal Aviation Act, the Ship Mortgage Act of 1920, 46 U.S.C. §§911-984 ("SMA"), exemplifies an act which, by its unmistakable language, preempts state law as to recording *and* priorities. Significantly, Section 921(a) of the SMA contains some language similar to that in Section 503, as follows:

> (a) No sale, conveyance, or mortgage which, at the time such sale, conveyance, or mortgage is made, includes a vessel of the United States . . . shall be valid, in respect to such vessel, against any person other than the grantor or mortgagor, his heir or devisee, and a person having actual notice thereof, until such bill of sale, conveyance, or mortgage is recorded . . .

Unlike the Federal Aviation Act, however, the SMA includes several additional provisions which do address the substantive priority of the interests recorded. For instance, Section 922 of the SMA defines a "preferred mortgage" and Sections 924 and 953(a) speak in terms of "prior and subsequent" liens. Finally, Section 953(b) of the SMA expressly defines the priority accorded to preferred mortgages.

The Federal Aviation Act, on the other hand, not only lacks provisions explicitly granting priorities comparable to those in the earlier SMA[6] but contains sections which

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[6] The Act does recognize one priority regarding the so-called "basket lien"—a lien over stocks of spare parts maintained for installation in aircraft, 49 U.S.C. §1403(a)(3)—by providing that a recorded interest in a specific engine shall have priority over both prior and subsequent recorded backet liens. 49 U.S.C. §1403(d). However, as Judge Wisdom noted in *Gary Aircraft*, the use of this specific language to cover this unique circumstance does not mean Congress was legislating an

indicate that the scope of its recording provisions is narrow and finite.[7] As the Seventh Circuit pointed out in its decision below,[8] those limiting provisions are found in Sections 501(f) and 506. Section 501(f) specifically states that the certificate of registration which is required in order to operate an aircraft "shall not be evidence of ownership of the aircraft in any proceeding in which such ownership by a particular person is, or may be, in issue". 49 U.S.C. §1401(f).

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[6] (Continued)
entire set of priority rules to cover all interests. 681 F.2d at 371. Indeed, "this special case could just as readily suggest that Congress meant to leave other priority rules unchanged—that is, they are left to state law". *Id.* (footnote omitted).

[7] That Congress intended the SMA to be a more pervasive statute is not surprising in light of the historical role the federal government has taken in the maritime area as a result of the constitutional provision that the "judicial power" of the United States extends to "all cases of admiralty and maritime jurisdiction". U.S. Const. art. III, §2. *See generally* Sigman, *The Wild Blue Yonder: Interests in Aircraft Under Our Federal System*, 46 S. Cal. L. Rev. 316, 328 (1973). Thus, the ownership and registration of ships have traditionally been national in character. While there has been national interest in aviation safety and commerce, it has not extended to ownership matters.

[8] Contrary to the *amicus curiae's* statement that the Seventh Circuit "completely failed to consider the application of Section 503(c) of the Act" (Brief of Amicus Curiae, p. 7), the court did consider and examine Section 503(c). Moreover, the court correctly recognized that that provision had to be read in conjunction with Sections 501(f) and 506, which limit the preemptive effect of 503(c) to recording. 681 F.2d at 510.

Similarly, Section 506 enervates the petitioner's argument that the scope of Section 503's preemption reaches the substantive validity of the interest recorded providing:

> The validity of any instrument the recording of which is provided for by section 1403 [503] of this title shall be governed by the laws of the State, District of Columbia, or territory or possession of the United States in which such instrument is delivered, irrespective of the location or the place of delivery of the property which is the subject of such instrument. Where the place of intended delivery of such instrument is specified therein it shall constitute presumptive evidence that such instrument was delivered at the place so specified.

49 U.S.C. §1406. Section 506 unmistakably is a choice of law provision with respect to the substantive validity of the instruments recorded under Section 503. Yet, it would turn the statutory scheme on its head to have a forum selection statute for the "form" of the instrument only, if all other substantive aspects of the conveyance are controlled by federal law. Rather, the only reasonable construction is that Section 506 provides the appropriate state law to be applied to all substantive aspects governing the ownership interests and priorities relating to the conveyances in aircraft other than the actual recording.

Any remaining doubt as to the limited preemptive effect of Section 503 is eliminated by the regulations promulgated by the Federal Aviation Administration. Regulation 49.17 states, in pertinent part, as follows:

> The recording of a conveyance is not a decision of the FAA that the instrument does, in fact, affect title to, or an interest in, the aircraft or other property it covers.

14 C.F.R. §49.17(c). *See also* 14 C.F.R. §47.5(c).[9] The agency entrusted with the responsibility of administrating the Act, therefore, has unequivocally interpreted the Act as not affecting state law governing title and ownership. This regulation, while perhaps in the nature of an "interpretative rule" as opposed to a "legislative rule",[10] is nonetheless entitled to great weight as the administering agency's concrete application of the statute and should not be disturbed absent compelling reasons. *See Commissioner* v. *South Texas Lumber Co.*, 333 U.S. 496, 501 (1948); *Fawcus Machine Co.* v. *United States*, 282 U.S. 375, 378 (1931). Further, because federal regulations have no less preemptive effect than federal statutes,[11] the logical corollary to this precept is that where

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[9] Regulation 47.5(c), dealing with the registration of aircraft, provides as follows:

> Section 501(f) of the Act (49 U.S.C. 1401 (f)) provides that registration is not evidence of ownership of aircraft in any proceeding in which ownership by a particular person is in issue. The FAA does not issue any certificate of ownership or endorse any information with respect to ownership on a Certificate of Aircraft Registration. The FAA issues a Certificate of Aircraft Registration to the person who appears to be the owner on the basis of the evidence of ownership submitted pursuant to §47.11 with the Application for Aircraft Registration, or recorded at the FAA Aircraft Registry.

[10] *See Batterton* v. *Marshall*, 648 F.2d 694, 702 (D.C. Cir. 1980).

[11] *Fidelity Federal Savings & Loan Association* v. *De La Cuesta*, 102 S.Ct. 3014, 3022 (1982).

a regulation plainly shows that state law is not preempted, as here, the regulation should be accorded equal standing as the statute.

In sum, the Act does not explicitly — nor implicitly, except in a most strained and ambiguous way — manifest an intent by Congress to preempt the state law as to the substantive validity of the conveyances recorded. Accordingly, if under controlling state substantive law the recorded conveyance is void,[12] the fact that it is recorded does not resurrect the purported interest in the aircraft.

B. The Legislative History Of Sections 503 and 506 Demonstrates That State Substantive Law Was Not Preempted As To The Validity Of Conveyances Recorded Under The Act And Priorities.

The legislative history of the 1958 Act is of limited assistance in discerning the Congressional intent since both the registration and recording provisions of its forerunner, the Civil Aeronautics Act of 1938 ("CAA"), were enacted virtually unchanged. S. Rep. No. 1811, 85th Cong., 2d Sess. (1958); H.R. Rep. No. 2360, 85th Cong., 2d Sess. 15 (1958), *reprinted in* 1958 U.S. Code Cong. & Ad. News, 3741, 3755. *See also* Staff of Senate Committee on Interstate & Foreign Commerce, 85th Cong. 2d Sess., Comparative Print Showing Differences Between The Civil Aeronautics Act of 1938 and the Federal Aviation Act of 1958, 51-54 (Comm. Print. 1958). Accordingly, the legislative history of the CAA must be examined to ascertain the objectives underlying the establishment of a central federal recording system.

The Congressional reports and hearings of the 1938 Act disclose that the recording provisions of the CAA were

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[12] *See* pages 28 to 30 *infra*.

not subject to material controversy or extended discussion. *See* H.R. Rep. No. 2254, 75th Cong. 3d Sess. (1938); S. Rep. No. 1661, 75th Cong. 3d Sess. (1938); H.R. Rep. No. 2635, 75th Cong. 3d Sess. (1938) (Conference Report); *To Create A Civil Aeronautics Authority, 1938: Hearing on H.R. 9738 Before The Committee On Interstate And Foreign Commerce*, 75th Cong. 3d Sess. 405-407 (1938) (statement of Fred D. Fagg, Jr., Director of Air Commerce, Dept. of Commerce). Nonetheless, those reports and hearings do manifest that the purpose of establishing the central recording system was to prevent and eliminate confusion engendered by a multitude of state recording systems, not to establish the substantive validity of recorded conveyances or accord priority to recorded interests over all subsequent claims. *Id.* Indeed, the Senate version of the House Bill ultimately enacted as the predecessor to Section 503 was amended to delete language which would have specifically granted recorded instruments priority. 83 Cong. Rec. 6757 (1938).

Similarly, the legislative history to Section 506, added in 1964, reinforces the conclusion that the recording provisions of this Act do not preempt state law except as to recording laws.[13] Both the Senate and House Reports describe the purposes of Section 506 as follows:

> The principal purpose of the legislation is to establish a uniform Federal rule *as to which State law is applicable to a conveyance*, lease, or other transfer of title or interest in any aircraft or aircraft part

[13] Unlike the petitioner, respondents do not address the 1948 or 1959 Amendments since they do not shed light upon the relevant issues and were enacted primarily to accomodate technological advances in aircraft. *See* S. Rep. 1362 80th Cong., 2d Sess. (1948); H.R. Rep. No. 445, 86th Cong., 1st Sess. (1959), *reprinted in* 1959 U.S. Code & Cong. Ad. News, 1762; S. Rep. No. 221, 86th Cong. 1st Sess. (1959).

> which may be recorded under section 503 of the Federal Aviation Act.

H.R. Rep. No. 1033, 88th Cong., 1st Sess. 1 (1964) (emphasis added).

> The bill would create a uniform Federal rule which would provide that *the validity of certain instruments affecting title to or interest in aircraft shall be governed by the laws of the State,* District of Columbia, territory or possession in which they are delivered.
>
> • • •
>
> [U]nnecessary and costly procedures which one must now go through to determine the validity of aircraft instruments would be remedied by this legislation. The bill selects and the committee is convinced, most logically, the place where the instrument is delivered. Consequently, the prospective purchaser would not only be able to readily ascertain whether encumbrances are recorded against an aircraft but would in addition be in the position to assess the validity of any instruments affecting the aircraft's title *by simply consulting the law of the place where the instruments were delivered.*

S. Rep. No. 1060, 88th Cong. 2d Sess., 1-3 (1964), *reprinted in* 1964 U.S. Code & Cong. Ad. News 2319, 2319-2321 (emphasis added).

Section 506 was clearly designed to be, and is, a choice of law provision. Even the petitioner recognizes Section 506 as such (Brief For The Petitioner, p. 24). Despite its concession that Section 506 requires state law to govern the validity of the conveyance, however, the petitioner concludes:

> It therefore follows that as between two parties acting in good faith and who have no notice of one another's transaction with respect to a single aircraft, the party who received delivery of *validly executed* instruments of conveyance must prevail upon the

> filing of those instruments with the FAA's central registry.

(Brief For The Petitioner, p. 24) (emphasis added). Apparently, the petitioner is of the view that if a document, purporting to represent an interest in an aircraft, is *executed* according to state law it is, without more, a "valid interest". That position does not square with common sense or legal standards since a document validly executed cannot breathe life into an otherwise dead letter.

Petitioner's view of the import of Section 506 is also at odds with the interpretation of its sponsors and draftsmen. The testimony of the Congressional hearings held in connection with the 1964 Amendment, indicates that the sole purpose of Section 506 was to direct interested parties to the applicable state law regarding the form of the instrument. *A Bill To Amend Section 503 Of The Federal Aviation Act: Hearing Before A Subcommittee Of The Committee On Interstate And Foreign Commerce,* 88th Cong., 1st Sess. (1963). It was not, in any manner, designed to preempt state law as to the validity of ownership interests or the relative priorities purported to be conveyed by the instrument. During the hearings[14] the sponsors of the new legislation, in response to direct inquiries, interpreted the provision as having no impact upon priorities or other substantive rights relating to the recorded instruments.

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[14] The actual colloquy from the hearings was as follows:

> Mr. Springer: . . . I just want to be sure that somebody who has physical possession of the aircraft and has really a legitimate lien under that State in the nature, we will say, of a tax lien, that we have not bargained away his right.
>
> Mr. Hill: Well, we certainly did not intend to. . .
>
> • • •

In light of this compelling evidence in its legislative history that Congress intended the preemptive scope of Section 503 to be confined to recording, it is telling that, in those decisions holding that state substantive law is also preempted, either the decision predated the enactment of Section 506 or the court did not examine the legislative history. *See,e.g., Sun Bank* v. *Snell* (*In re Cone*), 11 B.R. 925 (M.D. Fla. 1981); *Marsden* v. *Southern Flight Service, Inc.*, 227 F. Supp. 411 (M.D.N.C. 1961); *In re Veterans' Air Express Co.*, 76 F. Supp. 684 (D.N.J. 1948); *O'Neill* v. *Barnett Bank*, 360 So. 2d 150 (Fla. App. 1978); *Dowell* v. *Beech Acceptance Corp.*, 91 Cal. Rptr, 1, 476 P. 2d 401 (1970). In contrast, courts which have canvassed the legislative history have uniformly held that

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[14] (Continued)

Mr. Springer: Well, now if he is a creditor "shall be valid, in respect of the title or interest so transferred or created, as against all creditors."

Mr. Hill: That is the "validity" of the instrument. The instrument will be "valid" as against all creditors. It does not say he shall be prior to all other creditors.

Mr. Sibal: Will the gentleman yield?

Mr. Springer: Yes.

Mr. Sibal: It is not on the validity of it, it is the validity of substance of the two.

Mr. Hill: Yes; but not as to priority.

Mr. Springer: Now, is Mr. Calligar here?

Mr. Calligar: Yes.

Mr. Springer: How do you interpret this?

Mr. Calligar: Indeed, that provision does not go to priority as to creditors or lienors. That only goes to determine what law you look to to determine whether the instrument itself was a valid instrument. Priorities and precedents are under other bodies of law not involved with this legislation at all.

• • •

preemption under the Act encompasses only state law recording statutes and does not affect state law determinations of ownership interests or priorities. *See, e.g.*, *Gary Aircraft Corp.* v. *General Dynamics Corp.*, 681 F.2d 365 (1982); *Danning* v. *Pacific Propeller* (*In re Holiday Airlines Corp.*), 620 F.2d 731 (9th Cir.), *cert. denied*, 449 U.S. 900 (1980); *Haynes* v. *General Electric Credit Corp.*, 432 F. Supp. 763 (W.D.Va. 1977), *aff'd*, 582 F.2d 869 (4th Cir. 1978); *Cessna Finance Corp.* v. *Skyways Enterprises, Inc.*, 580 S.W.2d 491 (Ky. 1979).

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[14] (Continued)

> Mr. Hill: I can say only, sir, that it is not intended to do that, and I don't think it does. It provides only the law which determines the validity of the instrument as an instrument and does not purport to determine its priority as against others.
>
> • • •
>
> Mr. Hill: That is correct.
>
> Mr. Hemphill: But you are not saying that subsequent creditors and purchasers with value without notice cannot attack the lien priority, you are not saying that?
>
> Mr. Hill: That is right. I don't say that. The bill does not say that.
>
> • • •
>
> Mr. Williams: Mr. Sibal.
>
> Mr. Sibal: Just to reaffirm my position. This is the question we have to resolve, apparently. This is the point that Mr. Springer raised, that this bill restricts itself to the validity of the instrument which is delivered. I mean it provides for a system of clarification of of [sic] this particular instrument. It does not go into its relationship of other instruments and other liens; is that correct?
>
> Mr. Hill: Yes; that is exactly correct.

A Bill To Amend Section 503 Of The Federal Aviation Act: Hearing Before A Subcommittee Of The Committee On Interstate And Foreign Commerce, 88th Cong., 1st Sess. 24-28 (1963).

II. UNDER STATE LAW PHILKO'S INTEREST, IF ANY, IN THE AIRCRAFT IS INFERIOR TO THAT OF THE SHACKETS.[15]

A. The Shackets Were Bona Fide Purchasers Of The Aircraft And Received Good Title.

The manner of registration and recording of the relevant instruments in this case are not contested and are presumed to have been carried out in accordance with the Act and the FAA's applicable regulations.[16] Similarly, the choice of law question, also controlled by the Act, is not an issue here since the bills of sale were undisputedly delivered in Illinois. Pursuant to Section 506, therefore, Illinois law is controlling as to the underlying validity and effect of the documents recorded by the Bank which purported to convey title in the aircraft to Philko and a security interest to the Bank.

Both the District Court and the Circuit Court unequivocally held that the facts of this case compelled a finding that the Shackets were good faith buyers in the ordinary course pursuant to Section 1-201(9) of the Illinois Uniform Commercial Code, Ill. Rev. Stat. §1-

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[15] Respondents are fully aware that the substantive rights to the aircraft acquired by the Shackets and Philko which would be accorded under state law is not an issue before the Court and that those relative rights were fully resolved in the lower courts. However, a brief discussion of those rights is useful to demonstrate the inappropriateness and unfairness that could result if the Court were to adopt the position urged by the petitioner which essentially exalts the form of the instrument conveying title over the substance of the underlying transaction.

[16] 14 C.F.R. §§47-49.

201(9) ("UCC")[17] and had given value under UCC Sections 1-201(32), (44), since they: (1) paid $126,000 in cash and turned over the possession of their trade-in aircraft; (2) purchased from a dealer in airplanes; (c) inquired of Clark, the franchisee, as to whether the sale could be consummated; and (d) obtained immediate possession of the aircraft. Under applicable state law, therefore, the Shackets, as bona fide purchasers of the plane for value, obtained good title to the aircraft from Smith Aircraft. 681 F.2d at 512.

B. Philko Was Not A Bona Fide Purchaser And Did Not Receive Title To The Aircraft.

Unlike the Shackets, who did receive good title from Smith Aircraft, the Seventh Circuit correctly held that Philko was not a bona fide purchaser and did not acquire title to the aircraft as a result of the purported second sale from Smith Aircraft. 681 F.2d at 512. The fact that Philko may have given value to Smith Air-

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[17] Illinois has adopted Articles 1 and 2 of the Uniform Commercial Code without any substantial changes. Section 1-201(9) provides as follows:

> (9) "Buyer in ordinary course of business" means a person who in good faith and without knowledge that the sale to him is in violation of the ownership rights or security interest of a third party in the good buys in ordinary course from a person in the business of selling goods of that kind but does not include a pawnbroker. All persons who sell minerals or the like (including oil and gas) as wellhead or minehead shall be deemed to be persons in the business of selling goods of that kind. "Buying" may be for cash or by exchange of other property or on documents of title under a pre-existing contract for sale but does not include a transfer in bulk or as security for or in total or partial satisfaction of a money debt.

craft is not a sufficient reason to elevate it to the status of a bona fide purchaser. As the Seventh Circuit explained in its decision:

> "Buying" under UCC §1-201(9) specifically excludes transfers "as security for or in total or partial satisfaction of a money debt." Thus, a person may give "value" as defined in UCC §1-201(44) which specifically includes acquiring rights "as security for or in total or partial satisfaction of a pre-existing claim"), yet not be a "buyer" for purposes of UCC §1-201(9).

Id. Thus, because Smith Aircraft owed Philko $60,000 on its $80,000 loan and because Philko had no interest in the sales price to be paid by Krueger other than to repay the bank loan and the $60,000 loan balance, the Seventh Circuit held that Philko could not be a "buyer" in the ordinary course. *Id.*

Moreover, as the Seventh Circuit aptly noted, Philko's status as a good faith purchaser is not relevant to the dispositive issue of whether it received title to the aircraft. Judge Markey explained as follows:

> Whether Philko has the status of a good faith purchaser is of no consequence. Such status of itself cannot be the basis for good title in this case absent possession of the aircraft. At the time of the "sale" to Philko, Smith Aircraft had neither title to nor possession of the aircraft. Consequently, Philko could not under UCC §2-403(1) acquire good title from Smith Aircraft, whether any voidable title that may have arguably accrued to Smith Aircraft because it retained the title papers or otherwise.
>
> Accordingly, under state law, Philko acquired no title to the aircraft.

Id. (footnote omitted). Hence, petitioner's argument that a lender should be treated as a good faith purchaser (Brief For The Petitioner, pp. 33-34) is not only erroneous but irrelevant to whether Philko received title to the aircraft. Thus, notwithstanding Philko's wishes to the contrary, this is not a situation where there is a title dispute between two bona fide purchasers each having received a valid title, one of which recorded and one which did not. Irrespective of Philko's recordation of the "title papers", only the Shackets acquired a valid title to the aircraft from Smith Aircraft.

III. THE SHACKETS' UNRECORDED TITLE IS VALID AGAINST PHILKO BECAUSE PHILKO HAD ACTUAL NOTICE THEREOF.

Assuming, *arguendo,* that this Court adopts the position that Section 503 preempts state law not only for the registration and recordation of conveyances relating to aircraft but also as to the validity of title documents and respective property rights, the judgment in favor of the Shackets should be nevertheless affirmed. Section 503(c), by its express terms, recognizes the "validity" of an unrecorded interest as to "any person having actual notice thereof."

The so-called "actual notice" exception to Section 503 has been consistently construed to include not only actual knowledge of the unrecorded interest but also circumstances which should have provoked further investigation or inquiry. *See, e.g., Marsden* v. *Southern Flight Services, Inc.,* 227 F. Supp. 411, 416 (D.N.C. 1961); *Lochhead* v. *G.A.C. Finance Corp.,* 6 Ariz, App. 539, 434 P.2d 655, 658 (1967). In this case, Philko plainly had knowledge of events which, had Philko made minimal inquiry, would have led to the discovery of the prior conveyance by Smith Aircraft to the Shackets.[18]

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[18] The facts germane to this issue are not in dispute. Philko knew that Smith Aircraft did not have possession of the aircraft but made no inquiry to confirm Smith's representation as to the aircraft's whereabouts. 497 F. Supp. at 1265. McArdle also knew that Smith Aircraft was in a precarious financial situation since it had failed to repay Philko the $80,000 loan balance despite McArdle's pressure to do so and that its line of bank credit had reached its limit. Finally, McArdle knew that Smith had possession of the original bills of sale which was inconsistent with Smith's statement that the $152,000 he sought was needed to pay Clark the remaining sum due on the aircraft. *Id.*

In short, Philko, through McArdle, had actual knowledge of circumstances — lack of possession, financial difficulties, an inconsistency between Smith's representations and Smith's possession of the original bills of sale — which should have provoked further inquiry or investigation by Philko. The result of the investigation would have revealed Smith's scheme and would have prevented Philko's loss. The failure to undertake that investigation is equated to "actual notice" under Section 503 such that the Shackets' failure to record does not eliminate their superior ownership interest in the aircraft as to Philko.[19]

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[19] Although the lower courts did not reach the "actual notice" issue because the relevant facts were found not to be in dispute, respondents submit that this Court can find that Philko had "actual notice" of the Shackets' prior interest for purposes of Section 503 or, alternatively, at a minimum remand for a determination of "actual notice" by the lower courts.

IV. AFFIRMANCE OF THE SEVENTH CIRCUIT'S DECISION IN THIS CASE WILL NOT VIOLATE INTERNATIONAL CONVENTIONS OR ADVERSELY AFFECT THE AIRCRAFT FINANCING INDUSTRY.

A. The International Conventions Will Not Be Affected By Limiting The Preemptive Effect Of Section 503 To Recording Systems.

In its brief, the *amicus curiae* devotes inordinate discussion to the December 7, 1944 Convention on International Civil Aviation (the "Chicago Convention") and the 1948 Convention on the International Recognition of Rights in Aircraft (the "Mortgage Convention"), arguing that those Conventions require "a single federal recording system *to determine rights* in United States registered aircraft" (Brief For Amicus Curiae, pp. 20 to 25, emphasis added). Respondents submit that the Conventions require only that a national registration and recording system be established and not the eradication of state law to control substantive ownership rights. Accordingly, neither the objectives nor express provisions of the Conventions will be offended if Section 503's preemptive effect is restricted to recording aspects of aircraft rights, and not substantive ones.

The Mortgage Convention provides that:

> Nothing in this Convention shall prevent the recognition of any rights in aircraft under the law of any Contracting State.

Art. I, par. (2). This provision makes it clear that the existing substantive law of each Contracting State will control. Hence, to the extent that the determination of substantive rights of ownership in aircraft in a Contract-

ing State are governed by its territorial or political subdivisions the Convention does not require the Contracting State to adopt a uniform national law regarding substantive rights. This is further evidenced by the provisions of Article XVII of the Mortgage Convention, which provides as follows:

> If a separate register of aircraft for purposes of nationality is maintained in any territory for whose foreign relations a Contracting State is responsible, references in this Convention to the law of the Contracting State shall be construed as references to the law of that territory.

It is certainly no more of a burden or hardship on the members of the Conventions to examine each territory's separate law than it is to examine the separate laws of the states. Indeed, it is less so since Article XVII contemplates separate registries for each territory whereas the United States has one national registry by virtue of Section 501.

The Mortgage Convention's policy as to the effect of recordation on third parties is also perfectly consistent with a narrow interpretation of the preemptive effect of Section 503. Paragraph 2 of Article II states that:

> [T]he effects of the recording of any right mentioned in Article I, paragraph (1), with regard to third parties shall be determined according to the law of the Contracting State where it is recorded.

Nowhere in the Conventions' preambles or bodies is there the slightest suggestion that if the "law of the Contracting State" determines third parties' rights by looking to its political or territorial subdivisions, then paragraph 2 of Article II is no longer applicable. Congress was

cognizant of this fact in 1964, when it enacted Section 506,[20] since this amendment specifically provided that this choice of law provision would not affect the Mortgage Convention. 1964 Cong. Rec. 14523-14524.

B. The Aircraft Financing Industry Will Not Be Adversely Affected If State Law Controls The Substantive Validity Of Title And Ownership Rights.

The banks, financial institutions, and other lenders which are regularly engaged in financial aircraft purchases will not suffer any harm should this Court affirm the Court of Appeals in this case holding that the Act does not preempt state law as to the validity of titles and priorities of interests in aircraft. Lenders are fully accustomed to looking to state law in financing virtually all types of personal property many of which are also costly and mobile, from jewelry and mobile homes to construction equipment. Moreover, the burden of examining the law of each state, as exaggerated by petitioner and *amicus curiae,* has been substantially eliminated since every state but one has adopted all or substantially all of the Uniform Commercial Code.

Additionally, the lenders' risk of the so-called "hidden interest" of a prior unrecorded bona fide purchaser is no greater than that which exists as to the possibility that tax liens have been filed on the aircraft by the Internal Revenue Service. Under Regulation 49.17(a), 14 C.F.R.

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[20] Significantly, the *amicus curiae* does not attempt to reconcile the clear dictates of Section 506, which looks to state law, with its contention that the International Conventions require an absolute uniform federal law as to all aspects of recordation and rights in aircraft.

§49.17(a), federal tax liens need not be filed with the FAA. Thus, because the Service's practice is to file only with state authorities, it is necessary to review all fifty state records for possible tax liens. *See CIM International* v. *United States,* 641 F.2d 671, 673 n.2 (9th Cir. 1980).

Finally, it is noteworthy that the failsafe assurance of the FAA registry which the Aircraft Finance Association and other lenders seek is a practical impossibility, as the facts of this case amply demonstrate. The Shackets' closing took place on April 18 and the purported sale to Philko only six days later, on the 24th. The Bank conducted a title search on April 21, only three days following the Shackets' closing. Accordingly, even if the Shackets had been given proper bills of sale which they could have recorded, there was not an adequate interval such that the Bank would have learned of the Shackets' title. This is evidenced by the time required by the Bank to record its purported interest in May. The Bank mailed the bills of sale on May 25[21] and they were filed on May 31.[22] Further, the recordation process itself was not completed until June 13.[23]

Accordingly, even if the Shackets had mailed instruments for recordation the very day following the closing,

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[21] Regulation 49.11, 14 C.F.R. §49.11 requires conveyances to be recorded to be mailed to or delivered to the FAA Aircraft Registry in Oklahoma City, Oklahoma.

[22] Under Regulation 49.19 the effective date of filing for recordations is the date it is received by the FAA Aircraft Registry. 14 C.F.R. §49.19.

[23] The Bank representative, Richard Andrews, testified that the recordation process often takes as long as three to five weeks. (R. RA Dep. 114)

on April 19, it is likely that the instruments would not have been filed by April 21, the day the Bank conducted the search of the registry. The Bank made no subsequent checks of the registry prior to the purported second sale on April 24.[24] Thus, the fraud perpetrated by Smith Aircraft would have been successful even if the Shackets had promptly complied with the recording regulations.

[24] R. RA Dep. 109-110, 129-130.

CONCLUSION

The facts in this case poignantly illustrate the inequitable consequences which could result if Section 503 preempts state substantive law. Indeed, it is incongruous that the petitioner adopts the position it does in this case in light of its close relationship with the seller who defrauded both it and the respondents. In contrast, the respondents were bona fide purchasers of the aircraft who were unknowingly deceived and defrauded by the seller.

Notwithstanding the parade of imaginary horribles which the petitioner and *amicus curiae* suggest will result unless Section 503 is interpreted as totally preempting state law, the Federal Aviation Act simply was not designed to supplant state law regarding ownership and lienhold interests in aircraft. In fact, the interpretation of Section 503 which the petitioner and *amicus curiae* propose would engender confusion and chaos since the Act does not contain the guidelines necessary to choose between competing interests in aircraft. Clearly, Congress has the power to supplant state law on this subject but to conclude that it has done so on such a frail reed as exists in this case cannot be reconciled with the traditional doctrine of preemption.

For all of the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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No. 82-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,

Petitioner,

vs.

MAURICE SHACKET and SYLVIA SHACKET,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

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PETITION FOR CERTIORARI FILED AUGUST 20, 1982
CERTIORARI GRANTED DECEMBER 6, 1982

QUESTIONS PRESENTED

By enacting Section 1403 of the Federal Aviation Act, 49 U.S.C. Section 1403 (1981), requiring the recordation of conveyances affecting aircraft, did Congress preempt state law insofar as state law would permit the conveyance of title to aircraft by transfer of possession alone, without FAA recording?

Philko Aviation, Inc., the Petitioner herein, is a wholly owned subsidiary of McArdle, Ltd., a Delaware Corporation. Philko Aviation, Inc. has no subsidiaries. McArdle, Ltd. has the following wholly owned subsidiaries in addition to Philko Aviation, Inc.: Airport Farms, Inc.; American Lodging Corp.; Big Flamingo II, Inc.; Bonhomme Richard, Ltd.; Burr Hill Country Club Inc.; Burr Hill Properties, Ltd.; Forty-Six East Oak, Ltd.; Pheasant Run, Inc.; Rockton Productions, Inc.; Smith Road Properties, Inc.; Spanish Lakes, Inc. and Wilson World Travel, Inc.

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In The

Supreme Court of the United States

October Term, 1982

PHILKO AVIATION, INC.,

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vs.

MAURICE SHACKET and SYLVIA SHACKET,

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On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

REPLY BRIEF FOR PETITIONER

ARGUMENT

I.

SHACKET'S FAILURE TO RECORD WITH THE FAA WAS CAUSED BY HIS OWN FAILURE TO OBTAIN ORIGINAL BILLS OF SALE AND FILE THEM WITH THE FAA.

The issue in this proceeding is whether the recording provisions of Section 503, 49 U.S.C. §1403 (1981) preempt any state law which permits the conveyance of title to aircraft, valid as to third parties without notice, by

transfer of physical possession alone without FAA recording. Shacket's restatement of the Question Presented attempts to shift the Court's focus away from the true issues by alluding to his claimed status as a bona fide purchaser and by blaming the seller, Smith, Inc., for the failure to record. Shacket's failure to record, however, was caused by his own failure to insist upon and obtain the original bills of sale for the new Piper Navajo aircraft and failure to forward them to the FAA. In the concluding portion of his brief (Respondent's Brief p. 37) Shacket claims that his recording would not have prevented Philko's loss because of the short time period between the two transactions. This argument overlooks the obvious fact that Smith, Inc. would not have had original bills of sale to give Philko if Shacket had demanded them. Shacket concedes that Congress intended to enact a central recording system. (Respondent's Brief p. 22) A recording system requires that parties conduct their dealings with respect to aircraft by delivering instruments which can be recorded. Shacket never received a recordable instrument from Smith, Inc.

II.

THE LEGISLATIVE HISTORY OF SECTIONS 503 AND 506, INCLUDING THE SUBCOMMITTEE HEARINGS, DEMONSTRATES THAT THE FAILURE TO RECORD NULLIFIES AN INTEREST IN AIRCRAFT WITH RESPECT TO THIRD PARTIES WITHOUT NOTICE.

Petitioner Philko has previously discussed Senate Report No. 1060, 88th Cong., 2d Sess. 2 (1964) which reflects Congress' intent to continue the recording system for aircraft while providing a rule for choice of law on the substantive validity of *recorded instruments*. (Petitioner's Brief pp. 21-23) Respondent argues that the Sub-

committee hearings prior to the enactment of Section 506 reflect the view that the failure to record should have no negative impact upon priorities or other substantive rights of parties dealing with aircraft. This is not an accurate reading of the plain language of Sections 503 and 506 or the statements at the subcommittee hearings. Without doubt the drafters of Section 506 understood that a conveyance or encumbrance could not have substantive legal effect as against third parties without notice thereof unless such conveyance or encumbrance was filed for recordation with the FAA. The sponsors of Section 506 never intended to change this precept. Dee Martin Calligar, one of the principal draftsmen of Section 506, testified as follows:

* * *

> MR. CALLIGAR: The point there, Congressman Springer, is that we provide that one State's laws will determine the validity of the instrument between the parties *and that if the instrument is recorded with FAA* it will be deemed valid against all persons, all subsequent encumbrances, creditors, or purchasers.
>
> The scheme of things in this bill follows somewhat the scheme of things in the Federal Aviation Act as it is now written. Section 503(d) of the act provides that if an instrument is recorded with the Federal Aviation Agency it is valid and binding upon all persons in the United States.
>
> The provision you quote says the same thing, only it goes to the point of validity.
>
> * * *
>
> MR. SPRINGER: This is the point I am trying to raise. Suppose that you in New York take a mortgage on an airplane in Illinois, Ozark was one that you were pretty close to a minute ago which travels

across my district. Suppose that someone wants to buy an airplane from Ozark, we will say, under some circumstances.

How are they going to find out? Are they going to have to search through all 50 states to find if there is an encumbrance against that plane before they buy it?

MR. CALLIGAR: No. *The Federal Aviation Act itself provides for a recording system as to all encumbrances affecting title to aircraft. To be valid as against other persons, the instrument must be filed with the Federal Aviation Agency. That is the only place one need look to determine if there is any encumbrance on the aircraft. That is presently in the act, sir.*

MR. SPRINGER: All right. *In other words, it has to be filed with that Agency and you would have to file yourself with that Agency?*

MR. CALLIGAR: Yes.

MR. SPRINGER: *Is this so clear by the Federal Aviation Act that if you do file an encumbrance that a purchaser in good faith, all he has to do is check with the Federal Aviation Agency?*

MR. CALLIGAR: *Yes, it is so clear. It has been since the act was adopted.*

MR. SPRINGER: *No question about that.*

MR. CALLIGAR: *No question in my mind.*

MR. SPRINGER: Is there any providing for a recording by the FAA or is that instrument merely on file with them?

MR. CALLIGAR: Sir?

MR. SPRINGER: I am talking about the present law.

MR. CALLIGAR: The present law requires that such an instrument must be filed for record with the FAA.

MR. SPRINGER: And with them only?

MR. CALLIGAR: With them only.

MR. SPRINGER: It does not have to be filed with the district recorder?

MR. CALLIGAR: No. *The Federal recording provision preempts the law on that point, State recording laws to the contrary notwithstanding.*

MR. SPRINGER: Then they do not have to record that, we will say, in St. Louis or Champaign County, Ill.?

MR. CALLIGAR: They do not.

MR. SPRINGER: All right. There is no doubt about the law on that question. Now, what you are seeking then is to apply to the contract action itself the law of the State of New York for the most part, where most of these instruments would be executed?

MR. CALLIGAR: I dislike saying New York only.

MR. SPRINGER: We will say Chicago.

MR. CALLIGAR: All right.

MR. SPRINGER: All that you are seeking to do is apply the law of the State in which the instrument is delivered and recorded; is that correct?

MR. CALLIGAR: *In which the instrument is delivered, assuming that it is then recorded with the Federal Aviation Agency as the Federal Aviation Act requires. That step must be taken.*

A Bill to Amend Section 503 of the Federal Aviation Act: Hearing Before a Subcommittee of the Committee on Interstate and Foreign Commerce, 88 Cong., 1st Sess. 6-8 (1963) (Emphasis added).

Mr. Calligar emphatically stated that Section 506 was not intended to supplant the recording requirement of Section 503:

* * *

MR. SPRINGER: The point I am trying to get is this. We will say a creditor in Champaign County, Ill.—I do not know how he goes about this, but probably if he said, "I will give this as security or I do have it"—in order for him to file a suit and we will say to file a lien upon this man's aircraft would he have to look further than the courthouse in Urbana?

This is the point I am trying to get in my mind as to whether or not, even though you are not recording, you would have a preference by virtue of the fact we would be saying to you, because you have delivered this in the State of New York you comply in the State of New York, which undoubtedly would give you a lien without any question.

MR. CALLIGAR: No. *This bill does not go to the question of the applicability of State law as to the recorded status of the conveyance. In the case that you put, the first mortgage in Illinois would not be deemed notice to a second mortgagee or any other creditor because, as you put the case, the instrument was not recorded with the Federal Aviation Agency. The act requires that that be done.*

MR. SPRINGER: That is not quite the point. We will say that you do have a first mortgage. We will say this man then has a claim which he refused (sic) [reduced] to a judgment in the State of Illinois. He goes to the courthouse to see whether or not there is any lien against the aircraft. Then under the law of Illinois he would be entitled to levy upon the aircraft because there is no recordation in the courthouse in Urbana, but then under this you could raise a defense here to the State of New York law because this is where the instrument was delivered.

I am wondering whether we are going to get more complicated than we are. I realize you have complications here.

MR. CALLIGAR: I must disagree with the way you say it because currently the man would not be able to look to Illinois recording to see whether there was a mortgage on this aircraft. He must look to the Federal Aviation Agency recording branch in Oklahoma City because the Federal law requires that a mortgage to be deemed notice to the world must be recorded with the Federal Aviation Agency.

MR. SPRINGER: All aircraft?

MR. CALLIGAR: All aircraft.

Id. 13-14. (Emphasis added)

The preemptive effect of Section 503 was also recognized by James D. Hill, then General Counsel for the FAA, who testified in favor of Section 506 as follows:

* * *

MR. WILLIAMS: Mr. Hill, I wanted to ask you a question about this provision of H.R. 2522. On page 2 you make the statement that—

> Once an instrument is filed for recordation under the act, all persons are deemed to have constructive notice of its existence and its effect on the title of the aircraft involved.

MR. HILL: Yes.

MR. WILLIAMS: Let us take the hypothetical case of an aircraft which is financed in the State of New York by bank X. The bank in the State of New York records the instrument with the Federal Aviation Agency but does not record it with the State in the chattel mortgage records.

Subsequently, the man may have to have repairs or he may have to encumber his aircraft further so he goes to Y bank. Y bank takes a second mortgage and Y bank records this both in the State of New York and with the Federal Aviation Agency.

Under the laws of the State of New York, only the filing within the State of New York would constitute constructive notice.

In this case, would the second mortgage take priority over the first mortgage?

MR. HILL: No.

MR. WILLIAMS: Where constructive notice under the State law did not exist, but where under Federal law notice had been given.

MR. HILL: No, sir. *The effect of title 5 of the act is to preempt the field and to make State recording unnecessary. So that if X bank had recorded its first mortgage with the Federal Aviation Agency, it would be prior to Y mortgage even if it had not been recorded in New York. That is in subsection d.*

> Each conveyance or other instrument recorded under this system shall from the time of its filing for recordation be valid as to all persons without further or other recordation.
>
> MR. WILLIAMS: You think this effectively preempts State law?
>
> MR. HILL: Yes, sir; I think that is what it was intended to do.

Id. 21-22. (Emphasis added)

III.

PHILKO HAD NO NOTICE OF THE SHACKET TRANSACTION UNTIL AFTER IT FILED THE ORIGINAL BILLS OF SALE WITH THE FAA.

The district court below held that "Certainly there is no showing of fraud or a knowing interference with the Shackets' rights by Philko or McArdle." (Pet. App. 34a) There is no evidence in the record showing that Philko had any direct or indirect knowledge of Shackets' transaction until mid June of 1978, after the bills of sale had been filed. (R. E.M. Dep. 76-78, M.S.-2 Dep. 98-99) Given the highly mobile nature of aircraft, the absence of physical possession certainly is insufficient to put a party on notice of a possible adverse claim to the aircraft. By adopting the recording system Congress expressly sanctioned the use of documents rather than possession as a means of effecting conveyances of aircraft. Shacket claims to be a buyer in the ordinary course of business. This requires that he act in good faith and without knowledge that the sale to him was in violation of the ownership rights or security interest of a third party in the goods. Ill. Rev. Stat. Ch. 26, §1-201(9) (1961) It is uncontroverted that Shacket accepted xerox copies of the original bills of sale from Piper Aircraft to North States Aviation, North States Aviation to Clark Aviation and

Clark Aviation to Smith, Inc., and a purchaser's carbon copy of the bill of sale from Smith, Inc. to himself. (R. M.S.-2 Dep. 53-56) Although these copies reflected that the originals had been completed, Shacket accepted Smith's excuse that the originals could not be delivered because his secretaries could not finish typing them. (R. J.H. Dep. 44-49) Shacket, not Philko, had notice of facts which should have provoked further inquiry of the circumstances. Moreover, section 1401, 49 U.S.C. §1401 (1981) requires that an owner register his aircraft before he flies it. The registration process requires that the owner show proof of ownership. 14 C.F.R. Sec. 47.31 (1980) Shacket's total disregard of the statutory registration and recording requirements, which he fully comprehended, vitiate any claim that he acted in good faith and without knowledge that the sale to him was in violation of the ownership rights or security interest of third parties. Even under State law Shacket's claim to title is flawed.

Respectfully submitted,

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NO. 82-342

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PHILKO AVIATION, INC.,
Petitioner,

v.

MAURICE SHACKET AND SYLVIA SHACKET,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AIRCRAFT FINANCE ASSOCIATION

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QUESTIONS PRESENTED

Amicus curiae Aircraft Finance Association respectfully adopts the "Questions Presented" set forth in the Petition for Writ of Certiorari granted by this Honorable Court on December 6, 1982:

> By enacting 49 U.S.C. §1403 (Section 503 of the Federal Aviation Act of 1958), requiring recordation of conveyances affecting aircraft, did Congress preempt state law insofar as state law would permit conveyance of title to aircraft by transfer of possession alone, without FAA recording?

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IN THE

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ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

BRIEF AMICUS CURIAE OF THE AIRCRAFT FINANCE ASSOCIATION

The Aircraft Finance Association, with the consent of the parties and pursuant to Rule 36.2, Rules of the Supreme Court of the United States, respectfully submits this brief as *Amicus Curiae.*

INTEREST OF THE AMICUS CURIAE

This brief is filed because the *amicus* has a vital interest in the issues presented in this case as they relate to the validity and effect of conveyances or instruments required to be filed with the Federal Aviation Administration (FAA) Aircraft Registry for recording pursuant to Section 503 of the Federal Aviation Act of 1958 (the Act).[1] More specifically, the interest of the *amicus* is in the effect which a failure to record such instruments or conveyances has on the rights of third parties who may acquire or who may hold other interests in such aircraft.

The Aircraft Finance Association (AFA) is incorporated in the State of Texas as a non-profit trade association The membership of the association is comprised of full members which are banks, financial institutions, and lenders actively and regularly engaged in financing the purchase of aircraft, and of associate members who participate in such transactions on behalf of such entities as title search companies, insurers and attorneys.

The membership of the AFA includes most of the major lenders throughout the United States specializing in or having a substantial interest in financing of new and used aircraft. The total dollar volume of aircraft financed by the members of the AFA constitutes a substantial, if not major, share of the total dollar volume of aircraft financed in the United States. Even more importantly, the members of the AFA regularly and daily conduct a similarly substantial, if not major, portion of the transactions recorded in the FAA Aircraft Registry and of the transactions conducted in reliance upon the records

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[1] 49 U.S.C. §1301 *et seq.*

maintained by the FAA Aircraft Registry.[2]

It is essential to all persons interested in aircraft and to the AFA members and the customers and public that they serve, that the integrity and reliability of the FAA Aircraft Registry be maintained, as the documents and conveyances recorded by the Aircraft Registry are relied upon and must be relied upon before any informed decision can be made regarding the status of interests in any particular aircraft.[3]

---

[2] The FAA Aircraft Registry currently maintains records relating to approximately 279,000 aircraft, of which files approximately 200,000 are active at the present time.

The FAA Aircraft Registry annually receives 300,000 applications for aircraft registration and recordation of conveyances and other instruments relating to interests in aircraft. Of these applications, the FAA receives 95,352 bills of sale annually; 115,368 security agreements annually; 80,160 applications for aircraft registration annually; and the remainder of such filings relate to other miscellaneous documents including lien releases.

Even more significantly, the FAA Aircraft Registry receives 600,000 inquiries annually regarding the status of aircraft, and each year 190,000 aircraft files are checked out and physically reviewed and inspected by aircraft title search companies and other interested persons to determine the status of any interests relating to particular aircraft.

[3] *Amicus* AFA respectfully points out that the FAA aircraft recordation system does not issue or record documents entitled "certificates of title" to aircraft and that there are no "certificates of title" to aircraft as would be the case with motor vehicles and other similar classes of property. Instead, ownership of aircraft is determined by the chain of conveyances and other instruments affecting interests in aircraft recorded in the FAA Aircraft Registry. Thus, insofar as the parties to this case may refer to "title" or "certificate of title," the Court should be aware that formal "title" documents such as might provide actual notice to a subsequent purchaser or other interested party of any prior recorded or unrecorded transfer, assignment or lien on an aircraft, are not utilized with respect to conveyances or other interests in aircraft, and that the *only* method of determining ownership and interests in aircraft is an examination of the chain of conveyances and records maintained with regard to such aircraft in the FAA Aircraft Registry.

If a situation is created in which unrecorded interests may have priority as against the recorded interests of innocent third persons, then hidden or secret interests in aircraft would be fostered and given effect. This in turn would jeopardize and impair the overall integrity, reliability and effectiveness of the Aircraft Registry.

Such a chaotic situation would be further compounded by the fact that any third parties thereafter acquiring any interest in an aircraft would do so at their own peril. This result would be fundamentally inconsistent with the objectives to be served by providing a single federal recording system for interests in aircraft, and therefore should not be permitted to develop. The preemptive nature of Section 503 of the Act must be preserved with regard to the validity of recorded interests vis-a-vis unrecorded interests.

This *amicus* fully recognizes that Section 503 has given rise to other preemption and priority issues, and in particular to issues relating to the effect under Section 503(d) of recording (as opposed to the effect under Section 503(c) of non-recording) on the preemption of the buyer in the ordinary course of business doctrine under U.C.C. §9-307. Such other issues are not involved in this case, and this *amicus* accordingly does not address such unrelated issues in its main argument herein.

At the risk of repetition, we again state that it is the opinion of the *amicus* that the issue of preemption and priorities and any potential conflict between Section 503(d) of the Act and U.C.C. §9-307, are not issues before the Court in this case. This *amicus* therefore reserves comment concerning such other preemption issues involving Section 503(d) of the Act and U.C.C. §9-307 until such time as those issues are specifically accepted

by the Court for decision.[4]

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[4] *Amicus* understands that a Petition For Writ of Certiorari has been filed in the 1982 October Term in a case entitled General Dynamics Corporation, Petitioner v. Gary Aircraft Corporation, Respondent, Case No. 82-777, which does involve such other issues.

This *amicus* further believes that these other issues as to the effect of recording under §503(d), as presented in the *General Dynamics Corporation v. Gary Aircraft* case, are likewise of vital significance and importance, and *amicus* encourages the Court to grant certiorari in that case as well. This Court has never ruled on such issues relating to the effect of recording under §503(d) of the Federal Aviation Act, and there is substantial conflict and confusion regarding these other issues which can be resolved only by this Court upon full consideration of all of such issues *and the presentation of argument by all interested parties. Compare, e.g.*, Sanders v. M.D. Aircraft Sales, Inc., 575 F.2d 1086 (3d Cir. 1978), and Haynes v. General Electric Credit Corp., 583 F.2d 869 (4th Cir. 1978), with Dowell v. Beech Acceptance Corp., Inc., 3 Cal. 3d 544, 476 P.2d 401 (1971), and O'Neill v. Barnett Bank of Jacksonville, 360 So.2d 150 (Fla. App. 1978).

In part, the problems arising from such conflict and the resulting confusion concerning such other issues, are illustrated by the Seventh Circuit decision in this case presently before the Court. The Seventh Circuit decision, in the opinion of the *amicus*, is to a great extent the result of the extension and application of rather far-reaching language and dicta contained in many of the prior decisions and commentary relating to the effect of recording (as opposed to effect of non-recording) interests in aircraft under the Federal Aviation Act. As the present case illustrates, such broad and far-reaching language if taken to its logical extreme ultimately results in conflicts with the express language of the Act itself.

It is respectfully submitted that the present case demonstrates the need for direction in the construction and application of this federal statute, which direction ultimately can be provided on these issues of federal law only by this Court. Such issues relating to the effect of recording (as opposed to the effect of non-recording) *are directly raised* in General Dynamics Corp. v. Gary Aircraft Corp., Case No. 82-777.

SUMMARY OF THE ARGUMENT

Section 503(c) of the Federal Aviation Act of 1958 does and should provide the rule for determining the effect of a *failure* to record conveyances or instruments affecting interests in aircraft on the validity of such unrecorded conveyances and instruments as to other parties holding or acquiring interests in such aircraft.

Section 503 of the Act establishes a federal recording system for conveyances and other instruments affecting interests in aircraft, and Section 503 is essentially unchanged since first enacted as Section 503 of the Civil Aeronautics Act of 1938.

The federal objectives in establishing such a central federal recording system for interests in aircraft include not only providing a central nationwide procedure and place for recording such interests, but also providing a central record from which prospective purchasers, lenders and other interested parties can determine any outstanding conveyances or other such interests in any United States registered aircraft. The federal interest in achieving such objectives arises first from the view of Congress that state recording systems and laws are inadequate to provide a practical basis for protecting and determining interests in aircraft, and that such a federal system is therefore essential to the promotion of air commerce. Secondly, such federal interest also arises from the treaty obligations undertaken by the United States to provide and to maintain a single central recording system to determine ownership and interests in United States registered aircraft.

In order to achieve the foregoing objectives, Section 503(c) of the Act provides that as to conveyances and instruments required to be recorded under federal law,

such conveyances and instruments shall not be valid, except as to the giver or maker of such conveyance or instrument and parties having "actual notice" of such conveyance or instrument, unless and until so recorded. It is respectfully submitted that the straightforward and predictable application of Section 503(c) is fundamental and essential to the fulfillment of the federal objective of creating a central federal recording system for interests in aircraft and for protecting persons acting in reliance upon such recording system from hidden or secret prior unrecorded interests in aircraft.

It is further submitted that the decision of the Seventh Circuit Court of Appeals completely failed to consider the application of Section 503(c) of the Act and in so doing is the only federal decision attempting to apply state law, as opposed to the express language of Section 503(c), to determine the effect of a failure to record a conveyance or instrument required to be recorded under the Act, on the rights of third parties holding or acquiring other interests in such aircraft.

Amicus AFA also points out that Section 503(c) includes an exception to the foregoing general rule, which exception is intended to avoid injustice in appropriate cases by denying the protection of the federal recording requirement to persons having "actual notice" of such unrecorded conveyances or instruments. *Amicus* AFA expresses no opinion as to the possible application of such exception to the facts of this case, inasmuch as the lender is not a party to this appeal. *Amicus* AFA therefore leaves such issue to the parties for any further development in this case.

For the foregoing reasons, *Amicus* AFA respectfully submits that the decision of the Seventh Circuit Court of

Appeals in this case should be reversed to the extent that it applied state law and failed to apply Section 503(c) of the Federal Aviation Act to determine the effect of the failure to record the conveyance to the Shackets in this case on the validity of such conveyance as to third persons such as Philko Aviation, Inc. *Amicus* AFA further respectfully submits that such issue should be decided solely on the basis of the straightforward and predictable application of Section 503(c) of the Federal Act of 1958 to this case.

ARGUMENT

I. THE FEDERAL AVIATION ACT OF 1958 DOES AND SHOULD PROVIDE THE RULE FOR DETERMINING THE LEGAL EFFECT OF A FAILURE TO RECORD CONVEYANCES AND INTERESTS IN AIRCRAFT AND FOR DETERMINING THE VALIDITY OF SUCH UNRECORDED CONVEYANCES AND INTERESTS AS TO OTHER PERSONS HAVING OR ACQUIRING INTERESTS IN SUCH AIRCRAFT.

A. THE AIRCRAFT RECORDATION PROVISIONS OF THE FEDERAL AVIATION ACT OF 1958 EXPRESSLY REQUIRE RECORDING OF CONVEYANCES AND OTHER INSTRUMENTS AFFECTING INTERESTS IN AIRCRAFT AND SECTION 503(c) EXPRESSLY PROVIDES THAT SUCH DOCUMENTS SHALL NOT BE VALID, EXCEPT AS TO CERTAIN OF THE PARTIES TO THE TRANSACTION AND PERSONS HAVING ACTUAL NOTICE OF THE TRANSACTION, UNLESS AND UNTIL SO RECORDED.

The Federal Aviation Act of 1958 provides a central federal recording system for the filing of conveyances

and instruments affecting interests in aircraft. Sections 503(a) and (b) of the Act expressly read as follows:

RECORDATION OF AIRCRAFT OWNERSHIP
ESTABLISHMENT OF RECORDING SYSTEM

SEC. 503. [72 Stat. 772, as amended by 73 Stat. 180, 78 Stat. 236, 49 U.S.C. 1403] (a) The Secretary of Transportation shall establish and maintain a system for the recording of each and all of the following:

(1) Any conveyance which affects the title to, or any interest in, any civil aircraft of the United States;

(2) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any specifically identified aircraft engine or engines of seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff horsepower for each such engine or the equivalent of such horsepower, or any specifically identified aircraft propeller capable of absorbing seven hundred and fifty or more rated takeoff shaft horsepower, and also any assignment or amendment thereto or supplement thereto;

(3) Any lease, and any mortgage, equipment trust, contract of conditional sale, or other instrument executed for security purposes, which lease or other instrument affects the title to, or any interest in, any aircraft engines, propellers, or appliances maintained by or on behalf of an air carrier certificated under section 604(b) of this Act for installation or use in aircraft, aircraft engines, or propellers, or any spare parts maintained by or on behalf of such an air carrier, which instrument need only describe generally by types the engines, propellers, appliances,

and locations thereof; and also any assignment or amendment thereof or supplement thereto.

RECORDING OF RELEASES

(b) The Secretary of Transportation shall also record under the system provided for in subsection (a) of this section any release, cancellation, discharge, or satisfaction relating to any conveyance or other instrument recorded under said system.

49 U.S.C. §1403(a) and (b).

The current aircraft recording system is essentially unchanged from the federal aircraft recording system first established by Congress under the Civil Aeronautics Act of 1938, Pub. L. No. 75-706, §503, 52 Stat. 973, 1006 (1938), and such federal aircraft recording system was intended to meet the need for a central recording system relating to ownership and interests in aircraft.

At the present time, such central recording system specifically fulfills at least three objectives directly involved in this case:

(1) Providing a central recording registry so that owners, purchasers and financers of aircraft, in order to protect their legal and equitable interests, are not obligated to record their interests in aircraft in each state and county in which the aircraft from day to day might be located;

(2) Providing prospective purchasers, financers and investors with a central record of all interests in and to United States registered aircraft for the purpose of determining ownership and interests in such aircraft; and

(3) Providing a central record of ownership and interests in United States registered aircraft in order to comply with the obligations of the United States arising under the Convention on the International Recognition of Rights in Aircraft (the Mortgage

Convention), and other international agreements.

In addition to these objectives, the federal statute, and particularly Section 503(d), 49 U.S.C. §1403(d), entitled Effect of Recording, also provides a federal rule for determining the effect of recording interests in aircraft. However, the issue presented in this case does not require an examination of the priority effect under Section 503(d) of recording under the federal system. Instead, the issue in this case involves the effect under Section 503(c) of a *failure to record* under the federal system—the so-called "negative" effect of the statute.

Another objective of the federal statute is the creation of a *federal* "choice of law" rule with regard to the law to be applied to determine the underlying or inherent validity of any conveyances and instruments involved in an aircraft transaction. 49 U.S.C. §1406. As set forth in the legislative history:

> The bill . . . create[s] *a uniform Federal rule* which would provide that the *validity of certain instruments* affecting title to or interest in aircraft shall be governed by the laws of the State, District of Columbia, territory, or possession in which they are delivered.

S. Rep. No. 1060, 88th Cong., 2d Sess. (1964), *reprinted in* [1964] U.S. Code Cong. & Ad. News 2319-26.

Such federal "choice of law" rule is not involved in this case because such rule does not in any way obviate or eliminate the further federal requirement that such conveyance or instrument (even if it is valid as between the parties under the applicable state law under 49 U.S.C. §1406) must still be recorded under Section 503 of the Federal Aviation Act before it will have any validity *as against third persons other than persons having actual notice of the transaction*. As will be discussed further, the issue

in this case is precisely whether, under federal law, the unrecorded conveyance to the Shackets in this case is valid *as to certain third persons* to the transaction, even assuming that it might have been inherently valid as between the parties to the transaction, Smith Aircraft Sales and the Shackets, under the applicable state law under 49 U.S.C. §1406.

Returning to the objectives of the federal recording system involved in this case, a basic and fundamental requirement of such a central recording system for determining ownership and interests in aircraft is that *all* conveyances and instruments *must* be filed for recording in such systems. In order to achieve this requirement, Section 503(c) of the Federal Aviation Act of 1958 provides that such conveyances and instruments shall not be valid, except as to the person by whom the conveyance or instrument is made or given, and as to persons with "actual notice" thereof, unless and until such conveyance or instrument is recorded.

Section 503(c) of the Federal Aviation Act of 1958 expressly reads in pertinent part as follows:

CONVEYANCES TO BE RECORDED

> (c) No conveyance or instrument the recording of which is provided by section 503(a) shall be valid in respect to such aircraft, aircraft engine or engines, propellers, appliances, or spare parts against any person other than the person by whom the conveyance or other instrument is made or given, his heir or devisee, or any person having actual notice thereof, until such conveyance or other instrument is filed for recordation in the office of the Secretary of Transportation.

49 U.S.C. §1403(c).

The legislative history of Section 503(c) of the Civil Aeronautics Act of 1938 demonstrates the federal interest in providing a federal recording system in which interested parties would be able to determine the status of ownership and interests in aircraft. The object of Section 503(c) was described by one of the drafters of the House Resolution 9738, 75th Congress, who testified in 1938 as follows:

> At the present time and for the past ten years there has been an attempt to record the title or ownership of aircraft in the United States that are owned by citizens of the United States; but such recording has been solely for purposes of determining the nationality of the aircraft. In other words, that has been a step which was provided in the law for licensing of the aircraft under the provisions of the 1926 law.
>
> That has long been felt to be unsatisfactory and particularly when the Reconstruction Finance Corporation began to make loans, they felt there should be some protection, and many private owners have long felt that there should be some agency of the Government wherein any interest in aircraft could be recorded for their own protection because the buyer of a private airplane is up against a problem far worse than that of the purchaser, let us say, of an automobile, because aircraft can be moved so rapidly from state to state that state recording laws in their individual differences have worked a hardship on the buyer rather than really aiding him.
>
> One step in that direction would be, of course, to have a uniform state law; but the possibilities of getting that at any early date seemed to be somewhat remote and with that thought in mind, it has been suggested that the Federal Government serve that end by setting up a title recording agency within the civil aeronautics authority.

Hearings before the Committee on Interstate and Foreign Commerce. H.R. 9738, 75th Cong., 3rd Sess. 405-06 (1938).

Section 503(c) of House Resolution 9738 was thereafter adopted by the House-Senate Conference Committee in its conference report, and the purpose of such section was reported to be the following:

> Section 503. Recording of transfer of aircraft ownership: This section *requires the recordation* with the authority *of every transfer* made after the effective date of the section, *of any interest* in a civil aircraft of the United States. *The conveyance evidencing each such transfer is to be recorded with an index in a recording system to be established by the Authority.*

Conference Committee Report on S. 3845 and H.R. 9738, 75th Cong., 3d Sess. 8864 (1938).

As set forth above, the clear intent of Congress in enacting Section 503(c) of the Civil Aeronautics Act of 1938 was not only to establish a central national (federal) recording procedure for purchasers, but also to provide such a central national (federal) record in which parties interested in ownership of aircraft could review *every transfer of any interest* in a particular aircraft. Such federal interest and objective have been carried forward in essentially the same form in Section 503(c) of the Federal Aviation Act of 1958, and the integrity and reliability of the system established thereby is as vital and important to air commerce today as it was in 1938.

Accordingly, an examination of the Act as a whole and particularly the express language of Section 503(c) of the Federal Aviation Act and its legislative history, clearly establishes that conveyances and instruments affecting interests in aircraft (regardless of their underlying validity

under state law) shall *not* be valid as against persons other than certain of the parties to the transaction and persons having "actual notice" of such transaction, unless and until such documents are filed for recording under the Federal Aviation Act.

B. THE MAJORITY OF PRIOR DECISIONS RELATING TO THE EFFECT OF A FAILURE TO RECORD A CONVEYANCE OR INSTRUMENT AFFECTING INTERESTS IN AIRCRAFT HAVE APPLIED SECTION 503(c) OF FEDERAL AVIATION ACT IN A STRAIGHTFORWARD AND PREDICTABLE MANNER AND THE DECISIONS BELOW IN THIS CASE ARE THE FIRST AND ONLY FEDERAL DECISIONS THAT FAIL TO HOLD THAT THE FEDERAL AVIATION ACT PREEMPTS STATE LAW AS TO THE EFFECT OF A FAILURE TO RECORD SUCH CONVEYANCES AND INSTRUMENTS.

As a general rule and subject to the exceptions to be discussed below, the application of the provisions of Section 503(c) of the Act to the effect of a failure to record interests in aircraft has been straightforward and predictable: Unrecorded earlier interests have not been given priority over subsequent interests created prior to recording of the earlier unrecorded interests.[5] *Aircraft Invest-*

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[5] Obviously, in determining ownership to aircraft as between the parties to a transaction, federal recording of instruments relating to the transaction clearly is not a prerequisite to a valid and binding sale or encumbrance as between the parties. Norris v. Insurance Company of North America, 26 N.C. App. 91, 215 S.E.2d 379 (1975); Smith v. Joliet Airmotive, Inc., 35 Ill. App.2d 2, 181 N.E.2d 817 (1962); Bishop v. R. S. Evans, East Point, Inc., 80 Ga. App. 324, 56 S.E.2d 134 (1949).

Further, in determining ownership to aircraft as between the holder of an unrecorded interest and a holder of a subsequent interest

ment Corp. v. Pezzani & Reid Equipment Co., 205 F.Supp. 80 (E.D. Mich. 1962); *Marsden v. Southern Flight Service, Inc.*, 227 F.Supp. 411 (M.D.N.C. 1961); *American Aviation, Inc. v. Aviation Insurance Managers, Inc.*, 244 Ark. 829, 427 S.W.2d 544 (1968); *Pope v. National Aero Finance Co.*, 236 Cal. App.2d 722, 46 Cal. Rptr. 233 (1965); *McCausland v. Davis*, 204 So.2d 334 (Fla. 1967); *Blalock v. Brown*, 78 Ga. App. 537, 51 S.E.2d 476 (1949); *Marrs v. Barbeau*, 336 Mass. 416, 146 N.E.2d 353 (1957).

The decisions of the lower courts in this case, *Shacket v. Roger Smith Aircraft Sales, Inc.*, 497 F.Supp. 1262 (N.D. Ill. 1980), and *Philko Aviation, Inc. v. Shacket*, 681 F.2d 506 (7th Cir. 1982), are the only federal decisions found which have held that the effect of a failure to record pursuant to Section 503 of the Act is not to be determined by

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having "actual notice" of the earlier unrecorded interest, the failure to record the earlier interest does not give priority to the subsequent interest. Marsden v. Southern Flight Services, Inc., 227 F.Supp. 411 (D.N.C. 1961); Aircraft Investment Corp. v. Fisher Flying Service, Inc., 183 So.2d 441 (La. App. 1966). These cases also have held that "actual notice" is not only actual knowledge of the prior unrecorded interest, but also includes knowledge of facts which provoke inquiry into the possibility of such an interest or into the transactions out of which the interest arises.

Finally, the foregoing rules also have been applied to the holders of judgment liens, attachment liens, and tax liens, such that the holders of such *non-consensual* liens, who have not acquired such liens as *bona fide* purchasers *for value* in reliance upon the Federal recording system, generally acquire liens in the aircraft only to the extent of the interest of the judgment or attachment debtor or taxpayer. Thus, if the judgment or attachment debtor or taxpayer was a party to an earlier unrecorded transaction or had actual notice of an earlier unrecorded transaction, then such judgment, attachment and tax liens also may be subordinate to such unrecorded interest. CIM International v. United States, 641 F.2d 971 (9th Cir. 1980); Marshall v. Bardin, 169 Kan. 534, 220 P.2d 187 (1950). *But see* Wilson v. Barnes, 221 S.W.2d 731 (Mo. 1949). Such rule also may provide an alternative basis for the decision in Sun Bank v. Snell (In re Cone), 11 B.R. 925 (M.D. Fla. 1981).

federal law, and such decisions are in direct conflict with all other federal cases found which have considered such issue. The only other decision found which follows a state rule as to the effect of a failure to record is *Lochhead v. G.A.C. Finance Corp. of Camelback*, 6 Ariz.App. 539, 434 (1968).

Instead of applying Section 503(c) in a straightforward and predictable manner, the *Shacket* and *Lochhead* decisions have attempted to apply broad statements regarding the scope of federal preemption arising under federal aircraft recording law from other cases involving the effect of recording interests in aircraft under Section 503(d), as opposed to the effect of *not recording* or *failing* to record interests in aircraft under Section 503(c). *See Sanders v. M.D. Aircraft Sales, Inc.*, 575 F.2d 1086 (3d Cir. 1978); *Bitzer-Croft Motors, Inc. v. Pioneer Bank & Trust Co.*, 82 Ill. App.3d 1, 401 N.E.2d 1340 (1980); *Haynes v. General Electric Credit Corp.*, 582 F.2d 869 (4th Cir. 1978); *State Securities Co. v. Aviation Enterprises*, 355 F.2d 225 (10th Cir. 1968); *Northern Illinois Corp. v. Bishop Distributing Co.*, 284 F.Supp. 121 (D.Mich. 1968).

Applying such broad language to the interpretation and application of Section 503(c) relating to a *failure* to record, and giving priority to unrecorded interests creates the problem of "hidden" or "secret" interests in aircraft. Such "hidden" or "secret" interests are fundamentally incompatible with the basic objectives of the central federal aircraft recording system for interests in aircraft. Further, the application of such broad statements to give validity and effect to such interests results in a direct conflict with the express language of Section 503(c) of the Federal Aviation Act.

The application of a federal rule to determine the effect

of a failure to record also has been uniformly acknowledged by the legal commentators on the Federal Aviation Act and its predecessors. H. C. Sigman, *The Wild Blue Yonder: Interests in Aircraft Under Our Federal System*, 46 U.C.L.A. L.Rev. 316, 354-57 (1973); M. Scott, *Liens in Aircraft: Priorities*, 25 J. Air L. 193, 200-05 (1958); Note, *Taking The Lender For A Ride: Section 1403 Of The Federal Aviation Act And The Buyer In The Ordinary Course Of Business*, 36 Wash. and Lee L.Rev. 205, 212-13 (1979). While these commentators have not always advocated a broad rule of federal preemption, they nevertheless have recognized that in the case of a failure to record (such as involved here), Section 503(c) of the Federal Aviation Act does provide the rule of decision to be applied in disputes with subsequent purchasers without notice.

In summary, the clear majority of cases considering the effect of a *failure* to record a conveyance or instrument affecting an interest in aircraft have decided such issue under the express language of Section 503(c) of the Federal Aviation Act. Moreover, even the commentators on the federal aircraft recording system, while not uniformly in favor of a broad rule of absolute federal preemption, have recognized that as to a *failure* to record, Section 503(c) of the Federal Aviation Act itself provides the rule of decision and that the Act therefore preempts state law with regard to such "failure to record" issues.

C. THE FEDERAL OBJECTIVES OF SECTION 503 OF THE FEDERAL AVIATION ACT AND THE EFFECTIVENESS OF THE FEDERAL AIRCRAFT RECORDATION SYSTEM REQUIRE THAT AS A GENERAL RULE INNOCENT PURCHASERS AND HOLDERS OF INTERESTS IN AIRCRAFT BE PROTECTED UNDER FEDERAL LAW FROM HIDDEN OR SECRET UNRECORDED INTERESTS IN SUCH AIRCRAFT.

As previously stated in the Interest of the Amicus, it is vital to parties involved in aircraft transactions that the integrity of the FAA Aircraft Registry be maintained as a reliable and effective basis for commercial and financial transactions involving aircraft. The fundamental objectives of the federal recording system require not only that such system provide the exclusive national procedure and place for recording interests in aircraft, but also that all such interests in aircraft be so recorded in order fully to apprise other interested persons or parties of all outstanding interests in aircraft.

Each year approximately 190,000 federal aircraft files are physically examined and inspected in regard to aircraft transactions. Obviously, any possibility that "hidden" or "secret" unrecorded interests might be valid as against subsequent purchasers or lenders without actual notice who have relied upon the records maintained by the FAA Registry would severely and substantially impair the reliability and certainty afforded purchasers and financers of aircraft by such federal records.

It should also be noted that the FAA Registry provides the only basis or source records for determining interests in aircraft which have been increasing steadily in value and sophistication. It is not now unusual for business aircraft to be valued in excess of several millions

of dollars, and for transport aircraft to be valued at more than one hundred (100) million dollars, and for the financing of such aircraft to be extremely complex and sophisticated involving the interests of many parties. As a practical and legal matter, purchasers and financers of such aircraft require a high degree of certainty and reliability in undertaking such substantial and complex investments.

For these reasons, it is fundamental and essential that the express language of Section 503(c) of the Federal Aviation Act, which provides that unrecorded interests in aircraft shall not be valid, except as to certain parties to the transactions and others having actual notice of such interests, be given its full and intended effect in order to preserve the reliability and certainty provided in commercial and financial transactions by the FAA Registry.

II. INTERNATIONAL CONVENTIONS ALSO REQUIRE A SINGLE FEDERAL RECORDING SYSTEM TO DETERMINE RIGHTS IN UNITED STATES REGISTERED AIRCRAFT.

The United States has entered into two separate international conventions whereby the United States has agreed with other nations to establish central aviation registries, and further, to recognize reciprocally the rights in the national aviation registries of the other contracting nations.

On December 7, 1944, the Convention on International Civil Aviation (the Chicago Convention) was signed. It was subsequently ratified by the United States on August 9, 1946. In the Chicago Convention, the 143 signatory nations committed themselves to establish national aviation registries so that each of the nations would have a ready reference, located in a single identifiable

place, for the determination of rights in aircraft:

> Chapter III. Nationality of Aircraft . . .
>
> Article 21. Report of Regulations. Each contracting State undertakes to supply to any other contracting State or to the International Civil Aviation Organization, on demand, information concerning the registration and ownership of any particular aircraft registered in that State. In addition, each contracting State shall furnish reports to the International Civil Aviation Organization, under such regulations as the latter may prescribe, giving such pertinent data as can be made available concerning the ownership and control of aircraft registered in that State and habitually engaged in international air navigation. The data thus obtained by the International Civil Aviation Organization shall be made available by it on request to the other contracting States.

Chapter III, Article 21, *Convention on International Civil Aviation*, (the Chicago Convention), December 7, 1944, 61 Stat. 1180, T.I.A.S. No. 1591, 15 U.N.T.S. 295.

To implement the undertakings of the Chicago Convention, the contracting nations again met in Geneva, Switzerland in 1948 and signed the Convention on the International Recognition of Rights in Aircraft (the Mortgage Convention). The purposes of this Convention were stated in the preamble:

> Whereas, the International Civil Aviation Conference, held at Chicago in November-December 1944 recommended the early adoption of a Convention dealing with the transfer of title to aircraft,
>
> Whereas, it is highly desirable in the interest of the future expansion of international civil aviation that rights in aircraft be recognized internationally,
>
> The undersigned, duly authorized, have agreed on

behalf of the respective Governments, as follows:

Convention on International Recognition of Rights in Aircraft (the Mortgage Convention), Geneva, June 19, 1948, 4 U.S.T. 1830, T.I.A.S. No. 2847, 310 U.N.T.S. 151.

It is helpful at this juncture to consider the underlying objectives set forth in the preambles to both the Chicago Convention and the Mortgage Convention in relation to the objectives of federal supremacy over states of the United States regarding recordation of interests in aircraft. The entire structure established by the international conventions envisions a single registry in each of the contracting nations to which reference may be made to determine rights in aircraft registered under the nationality of that country. It is certainly not envisioned that an inquiry by the United States as to the registration of an aircraft of Swiss registry must be referred to each of the Cantons in Switzerland before an intelligent report on ownership could be made. Reciprocally, neither is it intended that a request to the United States would be referred from the Federal Registry at Oklahoma City to each of the individual fifty states or for that matter to check or verify the status of unspecified and unrecorded hidden or secret interests. Such a result would obviously make it impossible to fulfill the contracting nation's responsibilities. But, this would be the result if the conclusions reached by the opinion of the Seventh Circuit Court of Appeals were left to stand.

The Mortgage Convention obligates each of the 143 contracting nations to create and maintain a national registration of aircraft. To understand these obligations it is important to look at the following provisions of the

Mortgage Convention:

Article I

(1) The Contracting States undertake to recognize:

(a) rights of property in aircraft;

(b) rights to acquire aircraft by purchase coupled with possession of the aircraft;

(c) rights to possession of aircraft under leases of six months or more;

(d) mortages, hypotheques and similar rights in aircraft which are contractually created as security for payment of an indebtedness;

provided that such rights

(i) have been constituted in accordance with the law of the Contracting State in which the aircraft was registered as to nationality, at the time of their constitution, and

(ii) are regularly recorded in a public record of the Contracting State in which the aircraft was registered as to nationality. . . .

Article II

(1) *All recordings* relating to a given aircraft *must appear in the same record* . . .

Article III

(1) The address of the authority responsible for maintaining the record must be shown on every aircraft's certificate of registration as to nationality.

(2) Any person shall be entitled to receive from the authority duly certified copies or extracts of the particulars recorded. Such copies of extracts shall constitute prima facie evidence of the contents of the record.

(3) If the law of a Contracting State provides that the

filing of a document for recording shall have the same effect as the recording, it shall have the same effect for the purposes of this Convention. In that case, adequate provision shall be made to ensure that such document is open to the public.

Articles I, II and III, *Convention on International Recognition of Rights in Aircraft* (the Mortgage Convention), Geneva, June 19, 1948, 4 U.S.T. 1830, T.I.A.S. No. 2847, 310 U.N.T.S. 151. (Emphasis added).

When reviewing the Mortgage Convention, it is evident that specific principles control the various covenants:

(1) The terminology "Contract State" refers to the signatory nation, and not to any component part, state, territory or political unit thereof.

(2) The signatory nations agree to recognize "mortgages, hypotheques, and similar rights in aircraft which are contractually created as security for payment of an indebtedness," and which are not generally accompanied by possession of the aircraft.

(3) Where these Articles speak to the

(a) "law of the Contracting State," or

(b) "a public record of the Contracting State," or

(c) "The regularity of successive recordings in different Contracting States,"

they are addressing national, federal governments, signatories to the conventions, and not separate, independent units of such signatories.

The Mortgage Convention is further explicit in requiring that "*All recordings* relating to a given aircraft must appear *in the same record.*" Article II, Section (1).

To put this matter in proper prospective, it is evident that the United States of America has obligated itself

vis-a-vis other governments to maintain a central national aircraft registry for the recordation of interests in aircraft. Further, this national registry must of necessity be preemptive vis-a-vis the fifty (50) individual states with regard to the recordation of such interests. This in turn does not envision the validity of unrecorded instruments as to foreign and domestic third parties without actual notice unless and until such instruments are properly recorded in the appropriate national registry.

III. DEPENDING ON THE FACTS OF THIS CASE, THE "ACTUAL NOTICE" EXCEPTION OF SECTION 503(c) OF THE ACT MAY BE APPLICABLE.

A. SECTION 503(c) OF THE FEDERAL AVIATION ACT PROVIDES THE BASIS FOR AVOIDING INJUSTICE IN APPROPRIATE CASES BY AFFORDING THE PROTECTION OF THE FEDERAL RECORDING SYSTEM ONLY TO PERSONS WITHOUT ACTUAL NOTICE OF UNRECORDED INTERESTS.

Section 503(c) of the Federal Aviation Act provides the basis for avoiding injustice in appropriate cases by affording the protection of the federal recording system only to persons without "actual notice" of unrecorded interests. Section 503(c) of the Act provides as follows:

> No conveyance or instrument the recording of which is provided for by subsection (a) of this section shall be valid in respect of such aircraft, . . . against any person *other than* the person by whom the conveyance or other instrument is made or given, . . . or *any person having actual notice thereof* . . . 49 U.S.C. §1403(c).

49 U.S.C. §1403(c). (Emphasis added).

As a result, in determining priority of interests in an

aircraft as between the holder of an unrecorded interest and the holder of a subsequent recorded interest, the unrecorded interest may nevertheless take priority over the recorded interest where the holder of such recorded interest may have had "actual notice" of the unrecorded interest. *Marsden v. Southern Flight Services, Inc.*, 227 F.Supp. 411 (D.N.C. 1961); *Aircraft Investment Corp. v. Pezzani & Reid Equipment Co.*, 205 F.Supp. 80 (E.D. Mich. 1962); *Aircraft Investment Corp. v. Fisher Flying Service, Inc.*, 183 So.2d 441 (La. App. 1966). These cases have also held that "actual notice" is not only actual knowledge of the prior unrecorded interest, but also includes knowledge of facts which should provoke inquiry into the possibility of such an interest or into the transaction out of which the interest arose.[4]

B. AMICUS AIRCRAFT FINANCE ASSOCIATION TAKES NO POSITION AS TO THE APPLICATION OF THE "ACTUAL NOTICE" EXCEPTION TO THE PARTIES ON APPEAL AND BASED ON THE RECORD IN THIS CASE.

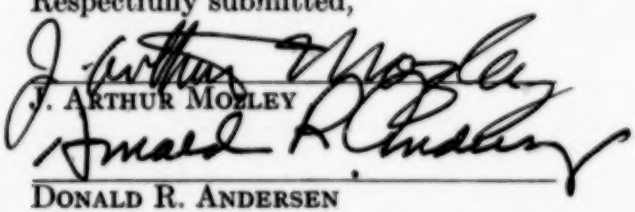
The *Amicus* does not take any position as to the application of the "actual notice" exceptions to this case inasmuch as the lender is not a party to this appeal, except to note that facts which might provide evidence of "actual notice" to a purchaser, would not under ordinary circumstances necessarily be evidence of "actual notice" to other third persons such as a lender. Whether such exception is otherwise applicable as between the parties on appeal in this case must be determined upon the facts and record herein.

[4] The cases on "actual notice" have afforded several specific, as well as general, examples of protection to unrecorded interests. Aircraft Investment Corp. v. Pezzani & Reid Equipment Co., 205 F. Supp. 80 (E.D. Mich. 1962).

CONCLUSION

For the foregoing reasons, *amicus curiae* Aircraft Finance Association respectfully submits that the decision of the Seventh Circuit Court of Appeals should be reversed to the extent that such decision fails to hold that Section 503(c) of the Federal Aviation Act preempts state law as to the effect of a *failure* to record a conveyance or instrument affecting an interest in aircraft, the recording of which is required under such statute. *Amicus curiae* Aircraft Finance Association respectfully submits that this Court should hold that Section 503(c) of the Federal Aviation Act provides the applicable rule of decision in this case.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I, J. ARTHUR MOZLEY, attorney of record for the Aircraft Finance Association and a member of the Bar of the Supreme Court of the United States, do hereby certify that on the 20th day of January, 1983, I served true and correct copies of the foregoing Brief *Amicus Curiae* of the Aircraft Finance Association upon the following attorneys of record for Philko Aviation, Inc. and Maurice Shacket and Sylvia Shacket pursuant to Supreme Court Rule 28, by depositing three (3) true and correct copies of the same in the United States Mail, correctly addressed and first-class postage prepaid, certified, return receipt requested:

Mr. Leslie R. Bishop
BISHOP & CRAWFORD
Oak Brook Regency Tower
East Tower, Suite 850
W. 22nd Street
Oak Brook, Illinois 60521

Mr. James C. Murray, Jr.
KATTEN, MUCHIN, ZAVIS,
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4100 Mid-Continental Plaza
55 E. Monroe Street
Chicago, Illinois 60603

This 20th day of January, 1983.

J. ARTHUR MOZLEY
Attorney of Record for
Amicus Curiae
Aircraft Finance Association

No. 82-342-CFX
Status: GRANTED

Title: Philko Aviation, Inc., Petitioner
v.
Maurice Shacket, et ux.

Docketed:
August 20, 1982

Court: United States Court of Appeals
for the Seventh Circuit

Counsel for petitioner: Bishop, Leslie R.

Counsel for respondent: Murray Jr., James C.

Entry	Date	Note	Proceedings and Orders
1	Aug 20 1982	G	Petition for writ of certiorari filed.
2	Sep 29 1982		DISTRIBUTED. October 15, 1982
3	Oct 14 1982	F	Response requested.
4	Nov 12 1982		Brief of respondent Maurice Shackett, et ux. in opposition filed.
5	Nov 17 1982		DISTRIBUTED. December 3, 1982
7	Dec 6 1982		The petition for a writ of certiorari is granted limited to Question A presented by the petition. **********
8	Jan 20 1983		Brief amicus curiae of Aircraft Finance Assn. filed.
9	Jan 24 1983		Brief of petitioner Philko Aviation, Inc. filed.
10	Jan 24 1983		Joint appendix filed.
11	Feb 22 1983		Brief of respondents Maurice Shackett, et ux. filed.
12	Feb 22 1983		Record filed.
13	Feb 22 1983		Certified original record & C.A. proceedings, (Box) received.
14	Mar 11 1983		CIRCULATED.
15	Mar 24 1983		SET FOR ARGUMENT. Wednesday, April 20, 1983. (1st case) 1 hour
16	Apr 13 1983	X	Reply brief of petitioner Philko Aviation, Inc. filed.
17	Apr 20 1983		ARGUED.